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IN THE
Supreme Court of the United States
OCTOBER TERM, 2001

RONALD P. WHITE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of South Carolina

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PETITION FOR WRIT OF CERTIORARI

JARED S. NEWMAN, P.A.
NEWMAN & MCDOUGALL
P.O. Box 1336
915 Port Republic Street
Beaufort, SC 29901-1336
(843) 379-7000

KENNETH W. STARR
Counsel of Record
DARYL JOSEFFER
RYAN PHAIR
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

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QUESTION PRESENTED

Whether the art of tattooing is entitled to any First Amendment protection.

PARTIES TO THE PROCEEDING

Petitioner Ronald P. White was the defendant/appellant below.

Respondent State of South Carolina was the appellee below.

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INTRODUCTION

The Supreme Court of South Carolina held that the First Amendment is wholly inapplicable to a statute banning an entire art form. According to that court, artistic expression is conduct, not speech. Based on this premise, the South Carolina Supreme Court held that an artist is protected only if his or her art is "'sufficiently imbued with elements of communication,'" which turns on "whether '[a]n intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood by those who viewed it.'" App. 5a (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)); *Texas v. Johnson*, 491 U.S. 397, 404 (1989)). Because the South Carolina court ruled that tattooing does not satisfy this test, it held that the state's complete ban on tattoo artistry is immune from *any* First Amendment scrutiny.

In a free society, this is intolerable. In a society that protects liquor advertising and pornography, it is inexplicable. Art deserves protection as art. To require that it convey a particularized message that is likely to be understood would mean that most modern art, and perhaps all satire, would be entitled to no protection at all. Only those with clear thoughts could translate them into art, and even then, they would have to write in eighth-grade English to ensure they were not misunderstood. Simply put, the South Carolina Supreme Court's decision is at war with artistic freedom.

It also conflicts with decisions of this and other Courts. The South Carolina Supreme Court relied on expressive conduct cases that are designed to determine which conduct, such as flag burning, rises to the level of protected speech. In contrast, this Court has repeatedly protected art as art, regardless of whether it also satisfies the expressive conduct test. Indeed, this Court has expressly determined that the *Spence* test is inapplicable in the context of artistic expression. The Court explained that if First Amendment protections were "confined to expression conveying a 'particularized message' [they] would never reach

the unquestionably shielded paintings of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). The South Carolina Supreme Court's refusal to even acknowledge this controlling and commonsense precedent marks such a sharp departure from the accepted course of judicial proceedings as to call for the exercise of this Court's supervisory powers. *See* S. Ct. R. 10(a).

The South Carolina court conflicted with precedents of other courts as well. The South Carolina Supreme Court used *Spence* as a basis for ruling that even if a tattoo itself is protected by the First Amendment, the art of creating the tattoo is not. In other words, it ruled that the government can punish an artist for creating and disseminating protected art. Not surprisingly, other courts confronted with this startling conclusion, including the Second Circuit, have rejected it. *See Bery v. City of New York*, 97 F.3d 689 (2nd Cir. 1996). The South Carolina Supreme Court's contrary decision reflects, in part, the uncertainty caused by this Court's precedents. While this Court has determined that the *Spence* test does not apply to artistic expression, it has not announced what test does apply.

This Court's guidance on this fundamental question is needed immediately. As matters now stand, petitioner Ronald White has been criminally convicted for practicing his chosen art form because he drew on skin instead of canvas. South Carolina may have grounds for *regulating* tattoo studios, just as it regulates numerous activities. But a complete ban on an entire art form throughout an entire state strikes at the core of the First Amendment. This Court's review is needed to bring clarity and uniformity to this fundamental arena of constitutional law.

OPINIONS BELOW

The Supreme Court of South Carolina's opinion is reported at 560 S.E.2d 420 and reprinted in the Appendix ("App.") at 1a-

13a. The unreported order denying the petition for rehearing is reprinted at App. 14-15a. The district court's unpublished ruling is excerpted at App. 16a-20a.

JURISDICTION

The Supreme Court of South Carolina entered judgment on March 4, 2002. Petitioner filed a timely petition for rehearing, which was denied on March 21, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) because Petitioner is challenging the validity of a state statute under the United States Constitution.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions are pertinent to this case:

1. The First Amendment to the United States Constitution states that "Congress shall make no law ... abridging the freedom of speech ...."

2. S.C. Code Ann. § 16-17-700 (2000 Cum. Supp.) declares: "It is unlawful for a person to tattoo any part of the body of another person. It is not unlawful for a licensed physician or surgeon to tattoo part of a patient's body if in his medical opinion it is necessary when performing cosmetic or reconstructive surgery.... A person who violates the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined in the discretion of the court or imprisoned not more than one year, or both."

STATEMENT OF THE CASE

A. Tattooing in the United States

The art of tattooing is more than 8,000 years old. *See Clinton R. Sanders, Customizing the Body: The Art and Culture of Tattooing* 9 (Temple 1989). It first became popular in the

United States in the early nineteenth century, and has undergone a renaissance in recent years. *See id.* at 16, 19.

Tattooing reached a low point in this country in the early 1960s, when a hepatitis outbreak in New York was thought to have been caused by an unsanitary tattoo artist on Coney Island. Newspapers soon began to spread stories of diseases allegedly contracted from tattoo studios. As public concern grew, and the public image of tattoo art declined, New York City and other jurisdictions initially banned tattooing altogether. *See, e.g.*, N.Y.C. Health Code § 181.15; Mass. Gen. Laws c. 265 § 34 (1962); S.C. Code Ann. § 16-17-700 (1966). Some of these bans were challenged on First Amendment and other grounds, but were generally upheld. *See, e.g., Grossman v. Baumgartner*, 218 N.E.2d 259 (N.Y. 1966); *Yurkew v. Sinclair*, 495 F. Supp. 1248 (D. Minn. 1980).

In the late 1980s and early 1990s, however, the fears of the 1960s came to pass as understanding of the health risks increased and tattoo artists banded together to ensure the safety of their craft. In 1985, the Center for Disease Control ("CDC") promulgated a set of guidelines known as the Universal Precautions for "personal service workers," including tattoo artists, who might come into contact with bloodborne pathogens. *See* CDC Fact Sheet, *HIV and Its Transmission* (July 1999) (available at www.phppo.cdc.gov). The Occupational Safety and Health Administration subsequently adopted the Universal Precautions in its own bloodborne pathogen rule. *See* 29 C.F.R. § 1910.1030. Any tattoo parlor with at least one employee is now bound by this rule. *See id.*(b).

In light of the success of these regulations, the U.S. Food and Drug Administration ("FDA") has declined to impose further regulations on tattoo inks even though they are subject to regulation as "color additives" under § 201(t) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.* *See*

FDA Advisory Opinion, Docket No. 81A-0315/AP (July 21, 1986) (referenced at http://www.fda.gov/cdrh/devadvice). A dermatologist at the FDA's Office of Cosmetics and Colors explained that the most common problem with tattoos is mere "dissatisfaction." FDA Fact Sheet, *Tattoos and Permanent Makeup* (Nov. 29, 2000). Likewise, the Center for Diseases and Radiological Health, a subdivision of the FDA that regulates medical devices, recently stated that it does not regulate tattooing devices because it is "not aware of any immediate hazards to health associated with the use of tattoo equipment nor was it felt that the equipment could not be properly cared for or handled to prevent any hazards." *Tattoo Equipment and Dyes* (available at http://vm.cfsan.fda.gov/~dms/ cos-204.html).

Now, approximately 40 years after the Coney Island incident, nearly every state in the union has determined that tattooing should be regulated, not banned. After the Massachusetts courts invalidated that state's ban on tattooing, *see Lanphear v. Massachusetts*, Sup. Ct., Suffolk County, Case No. 99-1896-B (2000), only two states—South Carolina and Oklahoma—continue to prohibit the art form. Outside of those states, tattoo art has become "the sixth-fastest growing retail business in the United States," as more and more people have embraced this ancient art form. *See Massachusetts v. Meuse*, Sup. Ct., Essex County, Case No. 9977-CR-2644 (1999) (quoting Hoag Levins, *The Changing Cultural Status of Tattoo Art* (1998)).

B. Ronald White's Conviction for Tattooing

In 1999, a local South Carolina television anchor asked petitioner Ronald White, a former tattoo artist, to assist with a three-part piece on the art of tattooing. The television station subsequently aired footage of petitioner, in his house, drawing a tattoo on the arm of another man. *See* App. 1a. The tattoo was a creative adaptation of an ancient tribal tattoo that signifies the onset of adulthood. After the television show aired, the

local Sheriff's office issued a warrant for petitioner's arrest. It is believed to be the only arrest in the thirty-year history of the South Carolina ban. *See* Transcript of Record before Harwell, J. (Oct. 30-31, 2000) at 5:13-5:24 ("Tr.").

At trial, petitioner admitted that he had violated the statute, but argued that the ban violated his First Amendment right to engage in artistic expression. *See* Tr. at 3:19-3:24. Although petitioner readily conceded that there are risks associated with the unsafe practice of tattoo artistry, he testified that he had followed all appropriate safety precautions. *See* Tr. at 18:18-19:17. He further argued that South Carolina's outright ban is not the "least restrictive means" to achieve the state's legitimate interest in the maintenance of public health. *See* Tr. at 45:2-45:24.

The trial court disagreed and upheld the ban. The court found that petitioner had engaged in a creative, artistic endeavor, Tr. at 103:20-25; 114:14-20, but held that fact irrelevant for First Amendment purposes because "even pure speech may be subject to reasonable regulation or prohibition, if it impacts on public health." App. 17a. On this question, the court did not hear any medical testimony, expert or otherwise, on the risk to public health. Instead, it relied solely on petitioner's statement that there can be risks associated with tattooing *if* proper precautions are not followed. *See* Tr. at 66:15-66:23.

In a divided opinion, the South Carolina Supreme Court affirmed. *See* App. 1a-13a. The court determined that the "threshold question" is "whether the conduct in issue is 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" *Id.* at 5a (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). Under this test, the court held that petitioner had "not made any showing that the *process* of tattooing is communicative enough to automatically fall within First

Amendment protection," even if tattoos themselves are protected expression. *Id.* at 6a (emphasis added). As such, the court held that the art of tattooing does not "fall within the First Amendment," is completely "unprotected" by the First Amendment, and is subject to *no* heightened scrutiny under the First Amendment. *Id.* at 7a. The court concluded that South Carolina's ban on tattooing satisfies the rational basis test applicable to all exercises of the state's police power because "the danger associated with the activity of tattooing, whether artwork or not, is a legitimate reason to regulate it." *Id.* at 6a.

Justice Waller vigorously dissented. He stressed that at least some First Amendment scrutiny applies to every form of artistic expression, be it painting, drawing, or tattooing. *See id.* at 10a. He then took issue with the majority's distinction between the process of drawing tattoos and the tattoos themselves, because the protection of art necessarily requires the protection of the process of creating art:

> The majority, by its emphasis of the word "process," appears to indicate that although the process of tattooing is not "speech," the end product thereof may be, such that the tattoo wearer may be entitled to First Amendment protection as the conveyor of a message. In my view, this is akin to saying that an author who is paid a commission to write a book by a publisher, or an artist commissioned to paint a rendering, does not engage in speech, but that the publisher, and purchaser of the painting, do engage in speech. I find such an analysis completely untenable.

Id. at 12a n.9. Justice Waller then explained that South Carolina's complete ban on the art of tattooing cannot survive the intermediate scrutiny applicable to content-neutral restrictions because less restrictive measures (*i.e.*, regulation) would suffice to protect the public health. *See id.* at 13a. He further noted that at this point in time, "there is no serious health risk involved in getting a tattoo." *Id.* at 11a.

REASONS FOR GRANTING THE WRIT

This Court should grant *certiorari* for three reasons: the decision below conflicts with decisions of this and other Courts; these conflicts result in part from uncertainties in this Court's jurisprudence; and this is a case of exceptional importance.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS.

The South Carolina Supreme Court's decision conflicts with this Court's precedents in at least two respects: it fails to protect art as art, and it applies a particularly restrictive test that this Court has expressly determined to be inapplicable to artistic expression. The South Carolina Supreme Court came into further conflict with decisions of other courts, including the Second Circuit, by distinguishing between the application and display of a tattoo. Only by departing from these precedents could the South Carolina Supreme Court rule that tattooing is entitled to *no* First Amendment protection.

A. The Decision Below Conflicts With Decisions of this Court Holding that Artistic Expression Is Entitled to First Amendment Protection.

The South Carolina Supreme Court came into conflict with this Court's decisions holding that artistic expression is protected by the First Amendment, as made applicable to the states by the Fourteenth Amendment. According to the decision below, artistic expression is protected only if it is "'sufficiently imbued with elements of communication'" to qualify as expressive conduct. App. 6a (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). The Court has always protected art as art, without regard to whether it is also "symbolic speech." *See, e.g., Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977) ("It is no doubt true that a central purpose of the First Amendment was to protect the free discussion of governmental affairs. But our cases have never suggested that

expression about philosophical, social, *artistic*, economic, literary or ethical matters ... is not entitled to full First Amendment protection.") (internal citations omitted); *Piarowski v. Illinois Community College*, 759 F.2d 625, 628 (7th Cir. 1985) ("[T]he freedom of speech and of the press protected by the First Amendment has been interpreted to embrace purely artistic as well as political expression (and entertainment that falls far short of anyone's idea of art ...) unless the artistic expression is obscene in the legal sense.").

The proposition that artistic expression is entitled to First Amendment protection without regard to its status as symbolic speech is perhaps most evident in this Court's obscenity jurisprudence. In the 1950s and 1960s, the Court struggled to craft a consensus on a workable definition of obscenity. This was complicated, in Chief Justice Burger's words, by the fact that "in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious ... artistic ... expression." *Miller v. California*, 413 U.S. 15, 23 (1973). In *Miller*, this Court therefore held that a state can prohibit an allegedly obscene work only if, *inter alia*, "the work, taken as a whole, lacks serious ... *artistic* ... value." *Id.* at 24 (emphasis added); *see also, e.g., Reno v. ACLU*, 521 U.S. 844, 865 (1997) (striking down portions of the Communications Decency Act because it "omits any requirement that [the relevant obscenity provision] lack serious ... artistic ... value," and emphasizing that prong's importance in ensuring that artistic expression is protected).

The *Miller* decision and its progeny thus established that artistic expression is entitled to First Amendment protection in its own right. Moreover, those cases did so *without regard to the specific medium of expression used. See, e.g., Kaplan v. California*, 413 U.S. 115, 119-20 (1973) ("When the Court declared that obscenity is not a form of expression protected by the First Amendment, no distinction was made as to the medium of the expression."). Accordingly, this Court has accorded

protection to a wide array of artistic mediums. *See, e.g., Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (1995) (stating that "the Constitution looks beyond written or spoken words as mediums of expression," and remarking that examples of painting, music, and poetry are "unquestionably shielded"); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment."); *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee."); *Kaplan v. California*, 413 U.S. 115, 119-20 (1973) ("[P]ictures, films, paintings, drawings, and engravings ... have First Amendment protection.").

Neither respondent nor the South Carolina Supreme Court has ever suggested that tattooing is any less an art than other forms of drawing and painting. Nor could they. *See, e.g., Sunrise Review*, South Carolina Reorganization Comm'n, Subcommittee Briefing on Regulation of Tattoo Artists (June 28, 1995) (acknowledging the long history of tattoo art). The art of tattooing is a historic and well-established form of artistic expression. *See The Dictionary of Art* 366 (Macmillan 1996). Archeologists and anthropologists have traced the art of tattooing back to the early Egyptians in 6000 B.C. *See* Clinton R. Sanders, *Customizing the Body: The Art and Culture of Tattooing* 9 (Temple 1989).

The modern history of Western tattoo art began with the exploratory voyages of Captain James Cook and his encounters with tribal tattooing in the South Pacific island of Tahiti. Sanders at 14 (quoting an entry from Cook's 1769 ship journal that reports that "[m]en and women [of Tahiti] paint their bodies" and notes that this is called "ta-tu"). The word "tattoo" entered the lexicon thereafter as Cook's adventures began to

capture the curiosity of the European aristocracies. *Id.* at 15. The tattoo rage soon made its way across the Atlantic to America around the turn of the nineteenth century. The emergence of the first class of tattoo artists in the Bowery district of New York, such as Martin Hildebrand, Samuel O'Reilly, Charlie Wagner, and Lewis Alberts, was spurred by Edison's invention of the electric stencil pen and O'Reilly and Wagner's adaptation thereof—the electromagnetic tattoo machine. *Id.* at 16-17. Most recently, the past three decades have marked a "renaissance" in the world of tattoo artistry. *Id.* at 19. As a Massachusetts court explained in overturning the Commonwealth's tattoo ban:

> The market demographics for tattoo services are now skewed heavily toward mainstream customers. Tattooing today is the sixth-fastest growing retail business in the United States. The single fastest growing demographic group seeking tattoo services is, to the surprise of many, middle-class suburban women. ... Tattooing is recognized by government agencies as both an art form and a profession and tattoo-related art work is the subject of museum, gallery and educational institution art shows across the United States.

Massachusetts v. Meuse, Sup. Ct., Essex County, Case No. 9977-CR-2644 at 5-6 (1999) (quoting Hoag Levins, *The Changing Cultural Status of Tattoo Art* (1998)). The ancient art of tattoo has thus evolved from the domain of early Egyptian tribes to the minivans and soccer moms of today. But the status of tattoos as art has not changed. "Some people buy a van Gogh. Some people buy art by Tattoo Lou. They wear it or they hang it. But it is all art." *See In This Artist's Hands,* N.Y. Times (July 1, 2001). And under this Court's artistic expression precedents, it is all protected by the First Amendment.

B. The Decision Below Conflicts With Decisions of this Court Holding that the *Spence* Test Does Not Apply to Artistic Expression.

The South Carolina Supreme Court's decision conflicts with this Court's precedents not only by holding that artistic expression is not entitled to First Amendment protection, but also by applying the extremely restrictive *Spence* test, which asks "whether '[a]n intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood by those who viewed it.'" App. 5a (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (citing *Spence v. Washington*, 418 U.S. 405, 410-411 (1974)).

Seven years ago, this Court ruled that the *Spence* test does not apply to artistic expression. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), the Court explained that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message' ... would never reach the *unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll*." *Id.* at 569 (emphasis added) (internal citation omitted). In so doing, the Court specifically contrasted *Spence*—the very case upon which the South Carolina court relied. *See id.*

Almost of all this Court's artistic expression cases are to the same effect as *Hurley*. All of these cases recognize that the act of engaging in artistic expression is a protected First Amendment activity. And *not a single one* of those cases conditions that protection on the restrictive *Spence* factors. *See, e.g., National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (art); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (music); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (motion pictures). Artistic expression has always been considered a pure form of expression protected by the First

Amendment in its own right. The South Carolina Supreme Court came into square conflict with this Court's precedents by holding otherwise.

C. The Decision Below Conflicts with Decisions of Other Courts Holding that the Dissemination of Protected Art Is Itself Protected.

The decision of the Supreme Court of South Carolina conflicts not only with these important precedents of this Court, but also with decisions of other courts, including the Second Circuit. The South Carolina Supreme Court used *Spence* as a basis for ruling that even if a tattoo itself is protected by the First Amendment, the art of creating the tattoo is not. *See* App. 6a. In other words, it ruled that the state can punish an artist for creating protected art. Not surprisingly, other courts confronted with this profoundly anti-liberty conclusion have rejected it.

In *Bery v. City of New York*, 97 F.3d 689 (2nd Cir. 1996), the Second Circuit invalidated a municipal ordinance barring visual artists from selling their work in public places under certain circumstances. The City of New York advanced the same arguments accepted by the South Carolina court here—that "visual art [is] mere 'merchandise' lacking in communicative concepts or ideas," and "the sale of art is conduct, and in order to be constitutionally protected, the sale of protected material must be inseparably intertwined with a particularized message." *Id.* at 695 (internal quotation omitted). The Second Circuit, citing *Hurley*, made short work of both arguments. Rejecting the application of *Spence*, it held that art is entitled to First Amendment protection because it is inherently expressive, even when it does not express a "particularized message" that is readily ascertainable. *Id.* at 696. The court then struck down the ordinance as unconstitutional because its "effective bar on the sale of artwork in public places" was "too sweeping to pass constitutional muster." *Id.* at 697.

The South Carolina court's decision in this case cannot be reconciled with *Bery*. *Bery* held *Spence* inapplicable and struck down a ban on the sale of visual art; the South Carolina court followed *Spence* and upheld a ban on the act of tattooing, which constitutes both the creation and sale of visual art. If anything, the South Carolina statute is more radical than New York's now-jettisoned measure. It is certainly not more defensible, given that the New York artists were free to create art and sell it in private places, while petitioner was criminally convicted for drawing a spiritual tattoo in his own home.

In addition to conflicting with *Bery*, the decision below conflicts with a recent Massachusetts decision striking down a nearly identical ban on tattooing. *Lanphear v. Massachusetts*, Sup. Ct., Suffolk County, Case No. 99-1896-B (2000), at 7; *see also Massachusetts v. Meuse*, Sup. Ct., Essex County, Case No. 9977-CR-2644 (1999) (dismissing tattooing indictment on First Amendment grounds). The Massachusetts court noted that tattooing "is believed to be the most commonly purchased form of original art work in the United States," and "the subject of museum, gallery, and educational institution art shows across the United States." *Id.* at 7. Citing *Hurley*, the court did not attempt to sever the act of creating a tattoo from the tattoo itself, because "the act of creating a tattoo is intrinsically part of the expressive content of the art," and is therefore subject to First Amendment protection in its own right. *Id.* at 10. Given the extreme nature of a total ban on an entire form of artistic expression, the court then ruled that the statute was unconstitutional on its face.

II. THESE CONFLICTS REFLECT LINGERING UNCERTAINTIES IN THIS COURT'S JURISPRUDENCE.

These conflicts reflect lingering uncertainties in this Court's jurisprudence. "While it is generally accepted that the First Amendment contemplates protection of art, the questions why

and to what extent have not been satisfactorily answered to date." Marci A. Hamilton, *Art Speech*, 49 Vand. L. Rev. 73, 77 (1996).

Hurley magnified the uncertainties regarding the proper treatment of artistic expression. In *Hurley*, this Court recognized that art defies the *Spence* test because not all art has a specific message that is readily apparent. *See* 515 U.S. at 569. But like the cases that had come before it, *Hurley* did not identify the proper test for lower courts to apply.

Part of the reason for the continuing jurisprudential uncertainty is that this Court has not had occasion fully to articulate the reason artistic expression is protected by the First Amendment. Instead, this Court has made varying suggestions on this pivotal point. In *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), the Court appeared to suggest that protection is warranted by "the subtle shaping of thought which characterizes all artistic expression." *Id.* at 501 (citing *Winters v. New York*, 333 U.S. 507, 510 (1948)). But in *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989), the Court suggested that the animating principle may be a broader conception of individual autonomy:

> Music is one of the oldest forms of human expression. ... [R]ulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state .... The Constitution prohibits any like attempts in our own legal order.

Id.; *see also Finley*, 524 U.S. at 602-03 (Souter, J., dissenting) ("Art is entitled to full protection because our cultural life, just like our native politics, rests upon the ideal of government viewpoint neutrality.") (internal quotations and citation omitted); Hamilton, 49 Vand. L. Rev. at 78 (suggesting an "anti-tyranny" rationale). A number of commentators have advanced still other potential theories. *See, e.g.*, Sheldon H.

Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, The Sublime, and the First Amendment*, 1987 Wis. L. Rev. 221 (1987) (discussing the aesthetic theories of Plato and Kant as a basis of an artistic expression doctrine).

The reason for protecting artistic expression will necessarily influence (if not determine) the level of protection accorded such expression. This case presents an ideal opportunity to address that issue and enunciate the guiding principles in this area. Doing so will go a long way toward bringing clarity to the law and permitting artists like petitioner to practice their arts without fear of criminal conviction.

III. THE QUESTION PRESENTED IS OF EXCEPTIONAL IMPORTANCE.

The exceptional importance of these First Amendment issues speaks for itself and warrants *certiorari* in its own right. *See Ward v. Rock Against Racism*, 491 U.S. 781, 784 (1989). This Court has recognized that a grant of *certiorari* is called for in the First Amendment context, even in the absence of a circuit split, "to clarify the legal standard applicable to [a] governmental regulation." *Id.*; *accord City of Los Angeles v. Alameda Books, Inc.*, 122 S. Ct. 1728 (2002).

South Carolina's decision not to tailor its statute in any way—but instead to prohibit all tattooing that is not performed by a doctor for medical reasons—further heightens the importance of this case and the need for *certiorari*. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 478) (granting *certiorari* to consider whether commercial speech ban failed "to advance a governmental interest in a direct and material way"). Complete bans on an entire medium of expression are subject to strict scrutiny precisely because they are contrary to our most fundamental constitutional values. *See, e.g., City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Accordingly, this Court has repeatedly invalidated attempts to

ban an entire medium of expression. *See, e.g., City of Ladue*, 512 U.S. at 56 (residential signs); *Schad v. Mount Ephraim*, 452 U.S. 61, 75-76 (1981) (live entertainment); *Jamison v. Texas*, 318 U.S. 413, 416 (1943) (handbills); *Schneider v. State*, 308 U.S. 147 (1939) (door-to-door distribution of literature); *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938) (pamphlets). Because the South Carolina statute prohibits all artistic tattooing—including all tattooing by anyone other than physicians and surgeons—it is subject to strict scrutiny. *Cf. City of Ladue*, 512 U.S. at 47 n.6 (invalidating statute notwithstanding its myriad exceptions).

The South Carolina statute is so far out of line with First Amendment values that it could not survive even intermediate scrutiny. In the courts below, the State of South Carolina attempted to justify the statute based on public health concerns. But the state introduced *no* evidence in support of this concern. *See* App. 2a. It cannot possibly overcome intermediate scrutiny merely by alluding to vague, undefined health risks. While it is true that some risks are involved when tattooing is done without proper precautions, the issue in this case is not whether tattooing poses some risks—it does—but whether the state has gone too far by banning the art altogether instead of regulating it.

It has. South Carolina is one of only two states that still impose a complete ban on tattooing. In the forty years since the Coney Island incident, society's understanding of the risks associated with tattooing and the proper precautions to alleviate those risks has increased exponentially. *See* pages 4-5, above. It is now widely accepted that the art of tattooing can be practiced safely. *See id.* Accordingly, South Carolina's outright ban cannot withstand any level of First Amendment scrutiny.

The First Amendment issues presented in this case are especially important because a ban on the act of tattooing is

effectively a double ban on the expression of tattoo artists *and* their patrons. If petitioner cannot perform his chosen artistry, his patron cannot display whatever message—political, religious, or social—he or she wishes to convey by wearing the art that petitioner creates. The First Amendment interests of those who wear tattoos are obvious. If a man can wear a profane slogan on his back in public, *see Cohen v. California*, 403 U.S. 15, he can surely wear a wide variety of tattoos on his body. But the Supreme Court of South Carolina has deprived its citizens of the right to *wear* tattoos by preventing artists and others from *drawing* tattoos. This double injury to First Amendment freedoms makes this case all the more important.

****

As matters now stand, an entire art form has been banned throughout an entire state and petitioner has been criminally convicted for safely drawing a spiritual tattoo in his own home. This Court's review is needed now.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

JARED S. NEWMAN, P.A.
DAUGS, TEDDER &
NEWMAN
1 Professional Drive
P.O. Box 690
Port Royal, SC 29934
(843) 525-0707

KENNETH W. STARR
Counsel of Record
DARYL JOSEFFER
RYAN PHAIR
KIRKLAND & ELLIS
655 Fifteenth Street, NW
Washington, D.C. 20005
(202) 879-5000

June 19, 2002

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APPENDIX A

Supreme Court of South Carolina

The STATE, Respondent,
v.
Ronald P. WHITE, Appellant.

No. 25421.

Heard Nov. 14, 2001.
Decided March 4, 2002.
Rehearing Denied March 21, 2002.

Chief Justice TOAL.

Ronald P. White ("Appellant") appeals his conviction for violation of section 16-17-700 of the South Carolina Code, prohibiting the tattooing of another person except by a licensed physician for cosmetic or reconstructive purposes. S.C.CODE ANN. § 16-17-700 (Supp.2000). We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Appellant was indicted by the grand jury for the Court of General Sessions of Florence County for violating section 16-17-700 of the South Carolina Code. Appellant was arrested sometime after WBTW TV aired a clip of him tattooing another person in his Florence County residence as part of a series WBTW prepared on tattooing. At trial, Appellant admitted he violated the statute, but argued the statute was unconstitutional on several grounds. Appellant made a motion to quash the indictment at the beginning of trial, arguing the statute was unconstitutional because (1) it impermissibly restricted his

freedom of speech in violation of the First Amendment of the United States Constitution and Article I, Section 2 of the South Carolina Constitution, (2) it restricted interstate commerce, and (3) it violated the Privileges and Immunities Clause of the United States Constitution.

The trial court found the statute constitutional. First, it found that tattooing was not speech, and, second, even if it were, prohibition of tattooing was a valid exercise of state power because of its impact on public health. The court dismissed Appellant's other constitutional claims on the same grounds, stating that the legislature may use "appropriate means" to "regulate or prohibit, if necessary" any occupation to protect public health. Finally, the court found that all contract and property rights are subject to "fair exercise of the police power to promote the general welfare." As Appellant admitted he violated the statute, he was found guilty as charged. He was sentenced to one year imprisonment and fined $2,500.00, suspended to five years of probation and a fine of $500.00.

The trial court did not hear any expert medical testimony regarding the dangers of tattooing or the risks to public health caused by the process of tattooing. In finding tattooing posed a risk to public health, the trial court relied on Appellant's own concession that there were risks to unregulated tattooing and on the general notion that it is the legislature's responsibility to decide what is injurious to public health.

Appellant appeals the trial court's decision, raising the following issue:

Did the trial court err in finding section 16-17-700 of the South Carolina Code[1] does not violate Appellant's freedom of speech as protected by the First Amendment of the United States Constitution[2] and Article I, Section 2 of the South Carolina Constitution[3]?

LAW/ANALYSIS

Appellant argues the trial court incorrectly upheld section 16-17-700 of the South Carolina Code, insisting the act of tattooing constitutes speech protected by the First Amendment. Appellant argues tattoos are a form of art or expression protected by the First Amendment. Assuming tattoos are protected expression, Appellant reasons those who create them should be afforded the same protection that he claims the creators of other protected expression enjoy (e.g., writers, painters, and sculptors). Appellant contends the process of tattooing cannot be separated from the display of the tattoo itself and both are protected under the First Amendment. We disagree.

The State argues that the trial court correctly upheld the statute, finding tattooing is not speech, and a rational relationship exists between the statute and public health. For support, the State cites several out of state, appellate and trial level opinions in which similar statutes have been upheld. *State v. Brady*, 492 N.E.2d 34 (Ind.App.1986); *People v. O'Sullivan*, 96 Misc.2d 52, 409 N.Y.S.2d 332 (N.Y.Sup.App.Term1978); *Yurkew v.*

---

[1] S.C.CODE ANN. § 16-17-700 (Supp.2000).

[2] U.S. Const. amend. I.

[3] S.C. Const. art. I, § 2.

Sinclair, 495 F.Supp. 1248 (D.Minn.1980). In each of these opinions, the court found tattooing did not constitute speech and then proceeded to analyze the statute applying a rational basis standard. *Id.* Each court determined (largely based on their common knowledge) that there are inherent risks to tattooing and gave the state's legislature wide latitude to determine how to best protect the general welfare of the state's inhabitants. *Id.* We agree with this position.

Our precedent establishes a general presumption of validity for legislative acts when subjected to constitutional attack, which can be overcome only by a clear showing that the act violates some provision of the Constitution. *Main v. Thomason*, 342 S.C. 79, 535 S.E.2d 918 (2000); *State v. Brown*, 317 S.C. 55, 451 S.E.2d 888 (1994). This presumption places the initial burden on the party challenging the constitutionality of the legislation to show it violates a provision of the Constitution. If the challenging party is able to show the act is invalid, leaving "no room for reasonable doubt that it violates some provision of the Constitution," the burden shifts to the state. *Thomason*, 342 S.C. at 86, 535 S.E.2d at 921 (citing *Westvaco Corp. v. South Carolina Dep't of Revenue*, 321 S.C. 59, 467 S.E.2d 739 (1995)). If the challenging party is unable to do so, however, it has not met its burden, and the challenge fails under this analysis.

Whether or not tattooing qualifies as speech, symbolic speech, or otherwise protected expression under the First Amendment is an issue of first impression in South Carolina. We look to the United States Supreme Court for guidance in analyzing this issue. According to the United States Supreme Court, the First Amendment protects speech, including conduct, if sufficiently communicative in character. *Spence v. Washington*, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842

(1974). The threshold question then is whether the conduct in issue is "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Id.* at 409, 94 S.Ct. at 2730, 41 L.Ed.2d at 846. Admittedly, this test requires line drawing. The Supreme Court has acknowledged this implicitly, but held it could not "accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672, 679 (1968) (upholding defendant's conviction for burning his draft card on the courthouse steps against the challenge that the conduct amounted to expression protected by the First Amendment).

In determining whether certain conduct is within the boundaries of First Amendment protection, the Supreme Court has "asked whether [a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 2539, 105 L.Ed.2d 342, 353 (1989) (citing *Spence*, 418 U.S. at 410-411, 94 S.Ct. at 2730, 41 L.Ed.2d at 846) (finding defendant's burning of the American flag during the Republican party's renomination of Ronald Reagan for President to be sufficiently imbued with elements of communication to qualify as protected conduct). In *Johnson*, the Supreme Court found the traditional use of flags for the communication of beliefs and the context in which the flag was burned to be instructive in determining the conduct was protected. *Id.* Additionally, the Supreme Court has considered relevant whether the conduct at issue would qualify as a "medium" for expression. *Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501, 72 S.Ct. 777, 780, 96 L.Ed. 1098, 1105 (1952) (holding

film to be protected under the First Amendment after noting it was a "significant medium for the communication of ideas").

In the present case, the resolution of Appellant's claim that the process of tattooing is protected expression depends on whether the Court finds that tattooing is "sufficiently imbued with elements of communication" as required by *Spence v. Washington*. 418 U.S. at 409, 94 S.Ct. at 2730, 41 L.Ed.2d at 846. Appellant claims the act of tattooing is artistic self-expression. However, the relevant inquiry is whether the act of tattooing is sufficiently communicative to warrant protection. Appellant has not made any showing that the process of tattooing is communicative enough to automatically fall within First Amendment protection. Burning of the flag, despite its potential safety risks, was protected because it conveyed an obvious political message. *Johnson*. Unlike burning the flag, the process of injecting dye to create the tattoo is not sufficiently communicative to warrant protections and outweigh the risks to public safety.

We agree with the dissent to the extent it argues content is not a justifiable reason to regulate tattooing, but find that the danger associated with the activity of tattooing, whether artwork or not, is a legitimate reason to regulate it. The dissent fails to recognize that tattooing, as opposed to painting, writing, or sculpting, is unique in that it involves invasion of human tissue and, therefore, may be subject to state regulation to which other art forms (on non-human mediums) may not be lawfully subjected.

In *O'Brien*, the Supreme Court made it clear the First Amendment does not protect all expressive conduct, even if intended to communicate. As discussed, application of the Supreme Court's test to determine what conduct is protected

requires some line drawing. Based on the record before us, we find that the act of tattooing falls on the unprotected side of the line. Appellant has not met his burden to show why tattooing, an invasive procedure, with inherent health risks, would fall within the First Amendment. *State v. Brady*; *People v. O'Sullivan*; *Yurkew v. Sinclair*.

Because we find the statute does not prohibit constitutionally protected conduct under the First Amendment, we will apply the test enunciated by this Court in *Main v. Thomason*, 342 S.C. 79, 535 S.E.2d 918 (2000). In *Thomason*, we addressed the extent of the legislature's authority to legislate for the protection of public health and general welfare. This Court stated, "[c]ourts will not interfere with the enforcement of regulations designed for the protection of health, welfare, and safety of citizens unless they are determined to be unreasonable." *Id.* at 86-87, 535 S.E.2d at 921- 22 (citing *Richards v. City of Columbia*, 227 S.C. 538, 88 S.E.2d 683 (1955)). "[T]he exercise of the police power is subject to judicial correction only if the action is arbitrary and has no reasonable relation to a lawful purpose." *Id.* at 87, 535 S.E.2d at 922 (emphasis added).

Under this analysis the challenging party again bears the initial burden, albeit a lesser one, to show the statute is arbitrary and has no reasonable relation to a lawful purpose. *Thomason*. If the challenging party makes this showing of arbitrariness, the burden shifts to the State to prove reasonableness. *City Council of Virginia Beach v. Harrell, III*, 236 Va. 99, 372 S.E.2d 139 (1988).[4] If the challenger cannot meet this threshold burden, the

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[4] The Virginia Supreme Court described the analysis succinctly: "if the reasonableness of the enactment is fairly debatable, a court will not substitute its judgment for that of the legislative body. When, however, the presumption

(continued...)

statute is presumed to have a rational relationship to a legitimate purpose within the authority of the legislature's police power and will be upheld.

In our opinion, Appellant, in this case, has not met this threshold burden; he has not rebutted the presumption of validity by showing the statute is arbitrary and unreasonable, with no relation to a legitimate governmental interest. *Thomason*. Appellant put forth no evidence other than his own testimony and the testimony of Mr. Black, a licensed tattoo artist in 12 states, regarding the safety or danger of tattooing. Neither Appellant nor Mr. Black has any medical training and both admitted there are risks to tattooing if the proper precautions are not taken. Although the State also failed to introduce current evidence of the risks associated with tattoos, the burden rested on Appellant to show the prohibition bears no reasonable relation to public health. The State argues tattooing can lead to hepatitis and other communicable diseases, and Appellant admitted tattooing does cause these risks if the proper sterilization measures are not taken. According to Appellant's own testimony, then, in the absence of affirmative regulation by the State, tattooing can endanger public health. With this admission, Appellant as much as conceded a rational relationship between tattooing and public health. As discussed, the legislature's exercise of police power is not subject to judicial correction unless its action is arbitrary and unreasonable. *Thomason*.

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[4] (...continued)
of validity is challenged by probative evidence of unreasonableness , the enactment cannot be sustained unless the legislative body meets the challenge with some evidence of reasonableness." *Id.* at 101-02, 372 S.E.2d at 141

The rational basis analysis set out in our precedent to test the legislature's authority under its police power gives the statute a strong presumption of validity. Appellant has not put forth any evidence to show that S.C.CODE ANN. § 16-17-700 serves no legitimate interest in protecting public health and thus has not overcome the presumption of constitutionality.

CONCLUSION

For the foregoing reasons, we AFFIRM the trial court and uphold Appellant's conviction.

MOORE, BURNETT and PLEICONES, JJ., concur.

WALLER, J., dissents in a separate opinion.

Justice WALLER dissenting.

I dissent. In my opinion, tattooing is "sufficiently imbued with elements of communication so as to fall within the scope of the First Amendment." *State v. Ramsey*, 311 S.C. 555, 430 S.E.2d 511 (1993).

The majority recognizes that, in determining whether conduct is protected by the First Amendment, the United States Supreme Court inquires whether an "intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct.

2533, 105 L.Ed.2d 342 (1989).[5] In my view, there is no doubt that, in creating words, pictures, or images on the bodies of those who wear tattoos, White is intending to convey a message and the message is likely to be understood by those who view it.

In my opinion, White's conduct in creating tattoos is a form of art which is entitled to the same protection as any other form of art. If a painter who creates an image on a piece of canvas has created a work of "art" thereby engaging in "speech" worthy of First Amendment protection, I see no reason why a tattoo artist who creates the same image on a person's body should be entitled to less protection.[6] In my view, whether or not something is "speech" protected by the First Amendment cannot focus upon the medium chosen for its expression.[7]

Although the majority cites several cases which have held that tattooing is not "speech," those cases were decided in an era when tattooing was regarded as something of an anti-social sentiment.[8] As noted in a recent synopsis,

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[5] *Johnson* held burning an American flag constitutes speech worthy of First Amendment protection.

[6] As noted recently in a New York Times article, "Some people buy a van Gogh. Some people buy art by Tattoo Lou. They wear it or they hang it. But it is all art." New York Times; Long Island Weekly Desk, In this Artist's Hands, Skin is the Canvas (Sunday, July 1, 2001).

[7] Indeed, it would be ludicrous to suggest that because Michelangelo chose the ceiling of the Sistine Chapel upon which to paint, his renderings are not communicative.

[8] Moreover, certiorari to the United States Supreme Court was not sought in any of the cited cases, and it appears that Court has never addressed this issue.

> The cultural status of tattooing has steadily evolved from that of an anti- social activity in the 1960s to that of a trendy fashion statement in the 1990s. First adopted and flaunted by influential rock stars like the Rolling Stones in the early 1970s, tattooing had, by the late 1980s, become accepted by ever broader segments of mainstream society. Today, tattoos are routinely seen on rock stars, professional sports figures, ice skating champions, fashion models, movie stars and other public figures who play a significant role in setting the culture's contemporary mores and behavior patterns ...
>
> The market demographics for tattoo services are now skewed heavily toward mainstream customers. Tattooing today is the sixth-fastest-growing retail business in the United States. The single fastest growing demographic group seeking tattoo services is, to the surprise of many, middle-class suburban women.
>
> Tattooing is recognized by government agencies as both an art form and a profession and tattoo-related art work is the subject of museum, gallery and educational institution art shows across the United States.

"The Changing Cultural Status of Tattoo Art" (http:/ www.tattooartist.com/history.html); *See also* Lawrence Muhammed, Tattoo You, Chicago Tribune (Nov. 4, 1997)(recognizing that tattoos have begun to appeal to people from every walk of life, and that, contrary to popular belief, there is no serious health risk involved in getting a tattoo, either. In most tattoo parlors, needles and inks are single-serve, gloves are

worn and other utensils are steam/autoclave-sterilized, the same method used by hospitals for surgical equipment).

Consistent with the more modern trend, it is my opinion the process of tattooing is indeed a protectable form of speech.[9]

Accordingly, since tattooing may be considered speech, it is subject to a higher level of scrutiny than that imposed by the majority. As White concedes, section 16-17-700 is, in effect, a "content-neutral" regulation which is subject to an intermediate level of scrutiny, i.e., it will be sustained if it a) furthers an important governmental interest, b) that interest is unrelated to the suppression of free speech, and c) the incidental restriction on speech is no greater than essential to the furtherance of that interest.[10] *See Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). In interpreting "content- neutral" ordinances, this Court has noted that "[p]ermissible time, place, and manner restrictions are justified by a substantial governmental interest unrelated to free speech and allow[ ] for adequate alternative avenues of communication ..." *Harkins v. Greenville County*, 340 S.C. 606, 613, 533 S.E.2d 886, 890 (2000).

---

[9] The majority, by its emphasis of the word "process," appears to indicate that although the process of tattooing is not "speech," the end product thereof may be, such that the tattoo wearer may be entitled to First Amendment protection as the conveyor of a message. In my view, this is akin to saying that an author who is paid a commission to write a book by a publisher, or an artist commissioned to paint a rendering does not engage in speech, but that the publisher, and purchaser of the painting, do engage in speech. I find such an analysis completely untenable.

[10] White concedes section 16-17-700 meets the first two prongs.

Here, section 16-17-700 effectively provides no alternative avenue of communication; it makes it unlawful for a person to tattoo any part of the body of another person, but provides that "[i]t is not unlawful for a licensed physician or surgeon to tattoo part of a patient's body if in his medical opinion it is necessary when performing cosmetic or reconstructive surgery." It taxes the brain to conceive of a manner in which White may practice his tattoo artistry. Even assuming, arguendo, he were to attend medical school and obtain a medical degree and license to practice medicine, he would still not be permitted to exercise his artistry for the purpose of expressing a communicative idea; the statute forbids tattooing unless it is medically necessary while performing cosmetic or reconstructive surgery. The statute is, in effect, a complete ban on any and all tattooing when done for artistic or communicative purposes. In my view, such a complete ban on the right of free speech cannot stand.

Although I agree, wholeheartedly, that the state may stringently regulate tattooing, the present record is insufficient to demonstrate that the restriction on White's speech is "no greater than essential" to the furtherance of the state's interest in protecting the health and well-being of its citizens.[11] Accordingly, I would hold section 16-17-700 violates White's First Amendment right of free speech.

---

[11] In fact, as noted by White in brief, some 46 states permit and regulate tattooing, and "[n]ot one reported death has been associated with tattooing in its five thousand year history."

APPENDIX B

[seal of the Supreme Court of South Carolina]

The Supreme Court of South Carolina

DANIEL E. SHEARHOUSE
CLERK OF COURT

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FAX (803) 734-1499

March 21, 2002

Jared A. Newman, Esquire
Daugs, Tedder & Newman
P.O. 1282
Beaufort, SC 29901-1282

Re: The State v. White, Ronald P.

Dear Counsel:

The Court has issued the following order on your Petition for Rehearing:

"Petition for Rehearing is Denied.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ E.C. Burnett, III J.

s/ Costa M. Pleicones J.

I would grant hearing.

s/ John H. Waller, Jr. J.

March 21, 2002."

The remittitur is today being forwarded to the lower court.

Very truly yours,

CLERK

DES/djp

cc: Attorney General Charles M. Condon
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Charles H. Richardson
Edgar Lewis Clements, III, Esquire

APPENDIX C

STATE OF SOUTH CAROLINA	)
COUNTY OF FLORENCE	)COURT OF GENERAL SESSIONS
	)99-GS-21-1543
STATE OF SOUTH CAROLINA	)
vs.	)TRANSCRIPT OF RECORD
	)
RONALD P. WHITE	)October 30-31, 2000
Defendant.	)Florence, South Carolina

BEFORE:

HONORABLE B. HICKS HARWELL, JR., Judge.

APPEARANCES

ROBERT WELLS, Deputy Solicitor
Attorney for the State

JARED S. NEWMAN, Esquire
Attorney for the Defendant

Keshia Reed
Circuit Court Reporter

* * *

[66]Whether tattooing be an art form, we do not deem it speech, or even symbolic speech. However, even pure speech may be subject to reasonable regulation or prohibition, if it impacts on public health. You can't holler fire in a theater or do something that impacts on public health. The defendant's right to engage in tattooing, is not and I emphasize is not paramount to the public's right to good heath.

The defendant in this case admits there is risk inherent. There is in other words danger without regulation. There is no regulations in South Carolina. It is specifically prohibited except with the enumerated exceptions in the statute. When the object of legislation is not the suppression of free speech, but the promotion of public health, there is no constitutional violation even if there is some incidental interference with liberty or property.

[67]And I cite People vs. O'Sullivan, which is the case in the New York Supreme Court decide 1978, and in 409 N.Y. 2nd, page 332. The cites reference by the Solicitor are not only on point. They are persuasive and convincing. And the appellate courts in the cases cited have been reviewed at the appellate level. And those jurisdictions, which include Florida and New York.

Counsel for the defendant is unable to furnish me not only any cites supported position in South Carolina. But no cites from the Appellate Court in the cases furnished. It is apparent for this court – This is a novel issue in this case. It is an issue of first impression in South Carolina. The Court after having made a diligent search is unable to find any cases in South Carolina, which are reflected of this issue. And at the Court's request, where both the State and defense counsel have had a great deal more time than the Court has had this afternoon anticipating this matter.

And specifically at the Court's request neither the Assistant Solicitor Mr. Wells nor defense counsel, Mr. Newman have furnished the Court any authority or cites in South Carolina on this issue supporting their position.

[68] It is the judgment of this court that this a matter in which the South Carolina General Assembly has the sole prerogative and who have invested a legitimate interest in the health and welfare of it's citizens. Therefore, I respectfully, Mr. Newman, deny your motion to quash the indictment on constitutional grounds and the authority cited by the defendant.

* * *

* * *

[70]MR. NEWMAN: You have denied us on First Amendment under the South Carolina Constitution of the First Amendment that are parallel Article 1 Section 3, are due process. Article 1 Section 2 on the right to privacy?

THE COURT: That is correct. Violation of the First Amendment.

(2)

Supreme Court, U.S.
FILED
AUG 16 2002
OFFICE OF THE CLERK

No. 01-1859

IN THE

Supreme Court of the United States

RONALD P. WHITE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF AMICUS CURIAE OF ENID SCHILDKROUT CHAIR AND CURATOR, DIVISION OF ANTHROPOLOGY THE AMERICAN MUSEUM OF NATURAL HISTORY IN SUPPORT OF PETITIONER

DAVID M. ROSEN
Counsel of Record
RANDY KANDEL
MARK J. FOX
726 Argyle Road
Brooklyn, NY 11230
(718) 434-0610

Attorneys for Amicus Curiae

175688

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) 3

Kaplan v. California, 413 U.S. 115 (1973) 3

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 3

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 3

Winters v. New York, 333 U.S. 507 (1948) 3

Constitution, Statutes and Rules:

U.S. Const. amend. I ..... *passim*

Miscellaneous:

Jane Caplan, *National Tattooing: Traditions of Tattooing in Nineteenth Century Europe* in *Written on the Body: The Tattoo in European and American History* 156 (J. Caplan ed. 2000) 5

L. Crawford, *The Tattoo of Life*, SOHO WEEKLY NEWS (Aug. 8, 1974) 9

Cited Authorities

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Margo DeMello, *Bodies of Inscription: A Cultural History of the Modern Tattoo Community* (2000)	12
Harriet Guest, *Curiously Marked: Tattooing and Gender* Difference in Eighteenth-century British Perceptions of *the South Pacific* in *Written on the Body: The Tattoo in European and American History* 83 (J. Caplan ed. 2000)	6
Mark Gustafson, *The Tattoo in the Later Roman Empire and Beyond*, in *Written on the Body: The Tattoo in European and American History* 17 (J. Caplan ed. 2000)	4
Don Ed Hardy, *The Upsetter*, 1 TATTOOTIME 26 (1982)	9
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Pierced Hearts and True Love (M. Demello ed. 1996)	10

Cited Authorities

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Nicholas Thomas, *Skin Deep: A History of Tattooing* (2002) 9

Marcia Tucker, *Tattoo: The State of the* Art, 19 ARTFORUM 42 (1981) 13

Victoria and Albert Museum, *Press Release* (April 29, 2002) 11

Victoria and Albert Museum, *Day of Record*, ***http://www.vam.ac.uk.*** 11

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INTEREST OF THE AMICUS[1]

Amicus Enid Schildkrout, Ph.D., is Chair and Curator of the Division of Anthropology, American Museum of Natural History New York, New York. She was Curator of the exhibition *Body Art: Marks of Identity* held at The America Museum of Natural History in New York City (November 1999 — June 2000) based on historical, anthropological, and art historical research done by many other scholars.

SUMMARY OF ARGUMENT

The United States Supreme Court has determined that the freedom of speech protections of the First Amendment extend to myriad forms of symbolic expression and not merely to expressions that convey a particularized message or political speech. Tattooing, a form of body decoration, constitutes symbolic and meaningful communication and constitutes an expressive art form. Like other forms of artistic expression, it has a long history in the United States and throughout the world and merits full First Amendment protection.

The human body has long been the subject of artistic expression. The body is not merely the subject of art but also a vehicle through which art is expressed. In dance it is virtually impossible to separate the art form from the vehicle of expression. Like other art forms, tattooing integrates the human body into the art as the medium of artistic expression. Tattoo art is a collaborative act requiring consent and

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1. Pursuant to Rule 37.6 the amicus states that no counsel for a party has authored the brief in whole or in part and no person or entity other than the amicus and/or counsel for the amicus made any monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief and letters of consent are being lodged herewith.

cooperation between the tattoo artist and the person whose body is being tattooed. Along with the tattoo artist, the recipient uses the tattoo to express his or her beliefs, ideas, and values or simply as a form of adornment.

Tattooing is an ancient art form. *See* Appendix A. Written accounts in Latin and stone sculptures found in Great Britain indicate that the ancient inhabitants of the British Isles, were covered with designs, most likely tattoos. Crusaders who visited Jerusalem in the Middle Ages often got tattooed with religious emblems that communicated to others their accomplishment in reaching the Holy Land. Tattoos also continued in Europe as marks of occupational identity: members of different guilds wore tattoos as a way of demonstrating their professions. Before people had proper names in Europe, tattoos were an important way of identifying people.

In the 19th century and for much of the early 20th century, tattooing in Western countries was an itinerant, marginal, self-taught practice and sailors, soldiers, and sideshow performers were the customers. Since the 1960's, artists with formal art training and an interest in the art of other cultures became interested in using the body as a medium for creating art. Tattooing is now widely accepted as a form of visual communication. The entry of tattooing itself into the artistic mainstream accelerated in the 1980's and 1990's and a wide variety of new styles are now available to an increasingly diverse and growing clientele. This includes women of all ages, athletes, fashion figures, musicians, firefighters and police, stockbrokers, lawyers, and academics. Recently, firefighters and police in New York have been getting memorial tattoos relating to the bombing of the World Trade Center affirming not only their loss but also their common identity as a community. Relatives of the deceased are among first time tattoo clients receiving memorial tattoos honoring particular victims of the attack.

In the past twenty-five years, major history, science, and art museums have put on exhibitions and associated lecture series and programs on the subject of tattoo. Tattooing, like music, painting, sculpture, drama, and dance, is part of expressive art and culture and embodies both the values and the aesthetic standards of particular societies. It is an expressive art that is as ancient as the human capacity to communicate through words and visual symbols and deserves full protection under the First Amendment.

ARGUMENT

I. TATTOOING IS A FORM OF ARTISTIC EXPRESSION ENTITLED TO FULL FIRST AMENDMENT PROTECTION

The human body has long been the subject of art in drawing, painting, and sculpture. The body, however, is not merely the subject of art but also a vehicle through which art is expressed. In dance it is virtually impossible to separate the art form from the vehicle of expression. Like other art forms, tattooing integrates the human body into the art, as the medium of artistic expression.

The First Amendment shields far more forms of expression than classic political speech. The Court has extended First Amendment protection to a wide array of art forms: entertainment, *Winters v. New York*, 333 U.S. 507, 510 (1948); film, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952); theater, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975); music, without regard to words, *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989); and parades, with or without banners or written messages, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995); pictures, films, painting, drawing and engraving, *Kaplan v. California*, 413 U.S. 115, 119 -120 (1973). "The Constitution," as the Court

has acknowledged, "looks beyond written or spoken words as mediums of expression." *Hurley*, 515 U.S. at 569. If the First Amendment reached only "expressions conveying a 'particularized message,'" its protection "would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll." *Id.* at 569. In sum, the First Amendment's fundamental purpose is to protect peaceful expression in all of its innumerable forms.

II. TATTOOING HAS A LONG HISTORY AS A FORM OF ARTISTIC EXPRESSION.

The designs that people apply to their bodies, whether in tattoos or with body paint, are part of an aesthetic vocabulary that reflects the cultural values and artistic traditions of particular cultures. Modern tattooing in Europe and America is often associated with the eighteenth-century voyages of Captain Cook to the Pacific, and the subsequent practice of mariners returning home with tattoos celebrating their journeys. But tattooing long predates Cook's voyages. Accounts in Latin and stone sculptures found in Great Britain indicate that the ancient inhabitants of the British Isles, known as the Picts, (contemporaries of the Romans and described by them), were covered with designs, most likely tattoos. *See* Mark Gustafson, *The Tattoo in the Later Roman Empire and Beyond*, in *Written on the Body: The Tattoo in European and American History* 17 (J. Caplan ed. 2000).

Tattooing did not disappear in Western Europe after the Picts. Crusaders who visited Jerusalem in the Middle Ages often got tattooed with religious emblems that communicated to others their accomplishment in reaching the Holy Land. There were many symbols used in Jerusalem tattoos, but they included the Christian Cross, the Virgin Mary, and references to the crusaders' accomplishments in war. Tattoos also

continued in Europe as marks of occupational identity: Members of different guilds wore tattoos as a way of demonstrating their professions. Before people had proper names in Europe, tattoos were an important way of identifying people. *See* Jane Caplan, *National Tattooing: Traditions of Tattooing in Nineteenth Century Europe. Id.* at 156-173. During wars, famines and periods of pestilence, parents often permanently marked their babies so that they could identify them in case they were lost. Before widespread literacy, when written speech could be used to codify personal identity information, tattoos served this purpose.

In the past, and still in some cultures today, some forms of tattooing are considered sacred in that they serve as a source of spiritual protection and power. Until the Renaissance, virtually all European art was religious with images being used in churches and as altarpieces. Similarly today, some people in the United States, particularly in the Latino community, who have religious images tattooed on their backs see these images as protective: an image of the Virgin Mary or the Virgin of Guadalupe, or of Christ, is said to be able to protect the wearer. Tattoos like these can be considered as part of a long tradition of religious art, made not simply as decoration but as a source of comfort, power, and protection.

III. TATTOOING HAS EVOLVED FROM A SELF-TAUGHT CRAFT TO A FORMAL AND INDEPENDENT FORM OF ART.

Tattoo designs varied greatly in different parts of Europe and can be correlated with other kinds of decorative motifs found in these specific regions. *See id* at 156. Imagery included religious symbols, objects denoting occupations, Masonic designs, family crests, written words, Romantic symbols such as hearts and drawings depicting loved ones,

military symbols and weapons, and mortuary imagery. After the voyages of Captain Cook to the Pacific, Europeans were introduced to a very different style of tattooing. Cook's artists brought back drawings of various styles of tattooing from the Polynesian Islands. Subsequently several tattooed people came to Europe and displayed their tattoos. Sailors began to get tattoos on their voyages, eventually leading to the creation of a dockside industry in Britain, Europe, and America. *See* Harriet Guest, *Curiously Marked: Tattooing and Gender Difference in Eighteenth-century British Perceptions of the South Pacific* in Caplan, *supra*, at 83-101.

But while the word "tattoo" derives from the Tahitian word *tatau*, Europeans never adopted the styles of Polynesian tattooing. The motifs and imagery of European and American tattoo remained firmly Western. European and American tattoos were discreet badge-like images, resembling wallpaper or greeting cards. They memorialized specific events, asserted a person's individual life history and proclaimed values. The badge-like designs that dominated Western tattooing until the late 1960's reflected social movements, occupations, national and local ideals, and personal life histories. Many tattoos commemorate specific events like World War II or the Vietnam War. All of these tattoos were worn like emblems, each one marking a specific life experience or aspect of identity.

In the 19th century and for much of the early 20th century, tattooing was an itinerant, marginal, self-taught practice and sailors, soldiers, and sideshow performers were the customers. Tattooists worked with portable kits, setting them up in the entertainment areas of cities, at sideshow amusements, and in ports and harbors.

With the invention of the electric tattoo machine by Samuel O'Reilly in 1890s and the development of urban amusement parks and circuses, American tattoo artists at the

turn of the century began to set up permanent shops, at first in the Bowery in New York and then in Coney Island; elsewhere tattoo parlors sprang up near navel and military bases. Tattooists produced conventional graphic designs, called "flash", which they hung in the windows and on the walls of their tiny shops to attract customers. They also drew custom patterns to suit a client's desires. Sailors might want their achievements and travels marked on their bodies in the form of 'across the equator' or 'round the world' images; sideshow performers had a penchant for religious imagery; patriotic tattoos were popular during the World Wars; images of love and loyalty — girlfriends' names and 'mom' and 'dad' — were staples for young men. And because Western sailors had at first encountered tattooing on their travels in the Pacific in the 18th century, tattoo designs have also reflected the interaction between East and West, although more by using images representing Asia than by adopting designs deriving from Pacific cultures.

The artwork associated with tattoos included not only the tattoos themselves, but also the drawings, known as "flash" that artists created, or simply bought and copied, to do their work. While not all "flash" can be considered original art, these works on paper are increasingly important as historical documents that reveal the history of popular culture. They are evidence of the way in which individuals related to the events of their times. However, some "flash" is identified with particularly accomplished tattoo artists and can bring high prices in galleries and at auctions.

Since the 1960's, artists with formal art training and an interest in the art of other cultures became interested in using the body as a medium for creating art. They apprenticed with traditional tattooists, exchanged information (and tattoos), traveled widely to study tattooing traditions, and periodically experimented with new techniques and materials. Rather than using "flash" and the repetitive designs this method implies,

these artists often show their work in portfolios with photographs of work they have completed. They tend to work in studios rather than storefront tattoo parlors, charging by the hour rather than by the "piece." Instead of outlining images in black and filling in blocks of color, they use a great variety of color and shading and do very fine work. Different artists have developed singular styles and people familiar with contemporary tattoo can often recognize the artist when they see a tattoo. Most importantly, these artists take into account the uniqueness of the medium — that is, the shape of the body — and personalize the tattoo. Often these tattoos are very large, take many sessions, and develop in a long collaborative relationship between client and artist.

These tattoo artists looked to Japan, Polynesia, and even to the history of Western painting for inspiration. They began to create large-scale full body tattoos taking into account the life histories and motivations of the client and the form of the body. Today these artists blend what they have learned from Asian cultures with the earlier Euro-American tattoo traditions. These tattoos are quite different from the earlier badge-like designs. They are unique one-of-a-kind art works and become known through the photographs taken by professional photographers like William DeMichele, Richard Todd, and Chris Rainier who specialize in photographing tattoo. Tattoo photography is another sub-field that depends on the recognition of tattoo as art. Some tattoo artists, trained in the fine arts, also sell their works on paper to clients who prefer the medium of paper rather than, or in addition to, getting a tattoo.

Tattoo artists use a variety of professional training manuals and guides today. Not only are most tattoo artists highly conversant with the various laws and regulations of the states in which they work, they also use sources such as Andrew John Lemes' *The Complete Handbook of Tattooing Techniques for the Artist* (1980). Trade associations,

conventions, and websites allow artists and clients to share their knowledge of each others' work. Apprenticeships are still the means by which artists learn the techniques of tattooing, but many practitioners now have formal art training that influences the kinds of work they do and the clientele they attract. Describing the state of the field a decade ago, the late Arnold Rubin noted that:

> As would be expected, given the nature of the medium — i.e. the requirement of an unmediated translation between artist and client — independent entrepreurship continues. This pattern appears to be accompanied, however, by increased stability, professionalism, and the use of media for self-promotion. Artists are regularly approached for large-scale projects by persons with few or no previous tattoos and who return for additional work. Major demographic shifts have brought in a greater number of females and generally older, better educated, more affluent, and more artistically sophisticated clients.

See Marks of Civilization: Artistic Transformations of the Human Body 235 (A. Rubin ed. 1988) (citing Don Ed Hardy, *The Upsetter,* 1 TATTOOTIME 26 (1982) and L. Crawford, *The Tattoo of Life,* SOHO WEEKLY NEWS (Aug. 8, 1974))

As tattooing has become more and more widespread, reaching into new segments of the population, avant-garde tattoo artists have had an important influence on the older-style practitioners. The new work has also revitalized interest in the various styles and practices of historic (e.g. Celtic) and non-Western cultures. Through increasing communication at conventions and exhibitions it has also even influenced artists in non-Western cultures, especially in the Pacific, who are reviving some of the older traditions. *See* Nicholas Thomas, *Skin Deep: A History of Tattooing* (2002).

The artists who entered tattooing after having formal art training in other media tended to have more education and were highly receptive to new techniques of practicing tattooing, including sterilization, scientific research into pigments, and art historical and anthropological research into the history of images and tattoo traditions.

When artists with formal art training began to expand their work to include tattoo, they worked at the intersection of popular culture and art. But the boundaries of "high" and "low" art have become more and more permeable since the 1960's. This is reflected in museum exhibitions of "outsider art" and art in new media like graffiti, advertising, fashion, and film. Art historian Marcia Tucker put it this way:

> Tattooing is finally, once again, coming into its own as another aspect of the fine arts. A new form of populism is emerging in the arts, a sense that artists no longer wish to address themselves and their work exclusively to each other and to a small, informed audience. Rather there is an increasing desire to work outside of traditional media, to address a non-art public, and to situate the work itself in a context larger than previously thought possible. Cited in *Pierced Hearts and True Love: A Century of Drawings for Tattoos* 85 (M. DeMello ed. 1996).

Today it is difficult to find tattoo practitioners, even those without formal art training, who are not influenced by the exhibitions, scholarly treatises, and conferences that consider tattoo as an art form. This dates back to the 1960's. In 1966, for example, Don Ed Hardy, who had an advanced Fine Arts degree, was asked to speak at the San Francisco Art Institute on tattoo as an American art form and its relationship to Pop

Art. *See* Rubin, *supra*, at 242. He has subsequently lectured at The Art Institute of Chicago, The Drawing Center, and at many other museums and universities. Other tattoo artists, like Hank Schiffmacher of Amsterdam, or Lyle Tuttle from San Francisco, also lecture to students and museum audiences.

The American Museum of Natural History held a symposium attended by about 300 people featuring tattoo artists in 1999 in conjunction with its exhibition *Body Art: Marks of Identity.* On Saturday April 29, 2000 the Victoria and Albert Museum staged its first "Day of Record" a series of events cataloging applied and decorative arts in relation to the body. Over 1500 tattooed people visited the museum on that day to have their artwork photographed for inclusion in the Museum's digital archive of tattoos. *See* ***http://www.vam.ac.uk***.

> Although tattooing is one of the oldest forms of decorative art, it is only in the last decade that it has come to be appreciated and valued for its design content, rather than for its ethnographic or sub-cultural impact. Responding to the current popularity of and interest in tattoos the V&A [Victoria and Albert Museum] has made a move towards recording the importance of tattooing in Britain at the beginning of the new century.

See Press Release, Victoria & Albert Museum, April 2000. The Day of Record was a series of events cataloguing applied and decorative arts in relation to the body. Over 1500 tattooed people visited the Museum on that day to have their artworks photographed for inclusion in the V&A digital archive of tattoos.

Important tattoo artists who fall into the *avant-garde*, include Phil Sparrow (Samuel M. Steward), Sailor Jerry (Norman Keith), Bert Grimm, Tom Yeomans, Zeke Owens, Lyle Tuttle, Cliff Raven, Ed Hardy, and Spider Webb (Joseph Patrick O'Sullivan). *See id. at* 233- 262. Some of these artists eventually devoted all of their time to tattooing, but others continued to work in other media. Many had varied art careers before entering tattooing. Sparrow, for example, "had been a member of Gertrude Stein's [literary] circle in Paris and had taught English literature at Loyola University in Chicago before abandoning the academic life to become a tattooist." *See* Rubin at 243. A second wave of artists working in the 1970's included Bob Roberts, the late Jamie Summers, and Jack Rudy. *See id.* at 253. *See also* Margo DeMello, *Bodies of Inscription: A Cultural History of the Modern Tattoo Community* (2000). At the same time, as more and more women were getting tattooed, female tattoo artists, many with formal art training, began to enter the field. In addition to Summers, they included Shiela May, Vyvyn Lazonga, Ruth Marten, Mary Jane Haake, the later SuzAnne Fauser, Jacci Gresham and Pat Sinatra. Since then, many more people, some of who trained with these artists, have entered the field and are now practicing all over the United States (except South Carolina and Oklahoma) and in Europe. While Rubin located the "renaissance" of tattooing in California, due partly to the fact that it was banned in many other states during the 1960's and 1970's, Chicago and New York also became early centers for tattoo artists. *See* Michael McCabe, *New York City Tattoo: The Oral History of an Urban Art* (1997).

The clients of these artists tended to be people associated with the entertainment, especially music, industries reflecting the fact that music, like tattoo, was a particularly important vehicle for communicating the anti-establishment sentiments of the period.

IV. NEW AMERICAN STYLES OF TATTOOING HAVE BEEN EMBRACED BY A WIDE VARIETY OF AMERICANS.

Art historian Marcia Tucker has identified the predominant style of tattooing in the United States as the "international folk style". *See* Marcia Tucker, *Tattoo: The State of the Art*, 19 ARTFORUM 42, 44 (1981). "It is characterized by agglomerate designs, often executed by many different tattooists on a single client, resulting in a 'collection' of conflicting styles, sizes and images." *See id.* at 44. These designs, sometimes drawn freehand and sometimes done with stencils, are applied without regard to the particular form of the body. The tattooists who work in this style are usually trained through apprenticeship, work in the entertainment zones of large urban centers, and drew, until the 1960's, on a mainly male clientele.

In the late 1960's a major shift in imagery and new types of customers developed with the Vietnam War and the resurgence of the Women's Movement. Those who identified themselves with various 'counter-cultures' —bikers, hippies, rock and roll performers, and women's liberationists — adopted tattoos as signs of both freedom from and rebellion against mainstream social values.

Today an increasing number of business, professional and middle-class people in general are getting tattoos. At the same time many of the styles and cultural expressions of 1960's and 1970's counter-culture have become mainstream. The entry of tattooing into the mainstream accelerated in the 1980's and 1990's and a wide variety of new styles in 'flash' and custom work are now available to an increasingly diverse and growing clientele. This includes women of all ages, athletes, fashion figures, musicians, firefighters, police, stockbrokers, lawyers, and academics. WGBH in Boston is

working on a documentary that includes a section on women meeting to get tattoos in the equivalent of Tupper Ware parties. Reflecting the increasing globalization of culture, and its heterogeneous clientele, contemporary tattoo design offers an eclectic mix of images from cultures across the world.

V. TATTOOING IS WIDELY RECOGNIZED AS A FORM OF VISUAL COMMUNICATION

The traditional badge-like tattoos, while still common, co-exist with many different kinds of images, including copies of paintings by famous Western artists, from Botticelli to Picasso to Miro; full body tattoos inspired by Japanese myths, geometric black tattoos derived from Polynesia, or images based on popular culture, including rock music and pop art. Religious tattoos, for example, images of the Virgin of Guadalupe, are common in the Latino and Hispanic communities, while some tattoo artists specialize in Christian iconography. Portraits of famous people are common, as well as portraits of loved ones, pets, landscapes, and important events. Recently, firefighters and police in New York have been getting memorial tattoos relating to the bombing of the World Trade Center affirming not only their loss but also their common identity as a community. For example, the firefighters in certain engine companies in New York are receiving identical tattoos. Relatives of the deceased are among first-time tattoo clients receiving memorial tattoos honoring particular victims of the attack. These kinds of tattoos can be considered a kind memorial art. Like monuments, gravestones, portraits and memorial quilts, they honor the deceased and express the sentiments of the living.

People who get tattoos have a great variety of motivations and reasons. Some do it to assert particular identities, including ethnic and religious identities. Others say they do it as a way of "gaining control" of their own bodies, or

flaunting convention, or asserting their freedom. Tattoos are a form of visual communication and as such they can carry many kinds of messages, from the most personal to the most political. Many people regard tattoos as intrinsically beautiful, but for others the messages expressed in the imagery are most important. For some, the act of getting tattooed and the interaction with the artist is most important.

People with tattoos often refer to them as "collections" of artwork. They also refer to specific tattoos by the names of the artists who created them. Tattoo artists, like other artists, are valued for the quality of their work and they can charge different amounts of money depending on their reputations.

VI. MAJOR MUSEUM EXHIBITIONS CONSIDER TATTOO AS ART AND AS PART OF EXPRESSIVE CULTURE

In the past twenty-five years, major history, science, and art museums have put on exhibitions and associated lecture series and programs on the subject of tattoo. *See* Appendix B and Hoag Levine, *The Changing Status of Tattoo Art* (1998). Tattoo Art has also become the subject of major scholarly symposia. *See* Appendix C. Natural history museums have dealt with the subject from an historical and cross-cultural point of view. Tattoo, like music, painting, sculpture, drama, and dance, is part of expressive culture and embodies both the values and the aesthetic standards of particular societies. Natural history museum exhibits, reflecting scholarship in the discipline, have dealt with both Western and non-Western tattoo, making explicit the cultural meanings expressed in this medium of expression. History museums have dealt with the changing meanings and practices of tattoo over time, both in the West — including Europe and North America — and elsewhere. Art museums

have focused on tattooing as an ancient art form that is increasingly accepted as an important medium for artwork. Given the consensual collaboration between tattoo artist and client, the skin becomes the canvas and the tattooed person becomes simultaneously the owner and collector of the tattoo, and the work of art itself.

It is noteworthy that a number of major museums have now begun to collect tattoo art, including photographs of tattoos, flash, and tattoo equipment and advertising. These institutions include the Victoria and Albert Museum in London, England, the National Museum of American History (Smithsonian Institution), the Fowler Museum of Cultural History (UCLA), the Southstreet Seaport Museum in New York and many others.

Perhaps the largest exhibition ever devoted to tattoo and other forms of body art was the 1999-2000 exhibit *Body Art: Marks of Identity* at The American Museum of Natural History in New York City, curated by the author of this brief. The Museum, opened in 1869, is the second largest natural history museum in the U.S.A. and receives nearly five million visitors annually. The exhibition, which received widespread press coverage, deliberately juxtaposed body art practices, including tattoo, from many cultures past and present. It focused not only on non-Western "exotic" cultures, but also the contemporary U.S.A., reflecting a trend in anthropology in general. The premise of the exhibition was that body art fulfills similar needs in all human cultures. While the specific aesthetic vocabulary of body art varies from place to place, the reasons that humans all over the world continue to use body art derive from its power as a way of communicating social identity and situating the individual in a social context.

CONCLUSION

For the foregoing reasons, the amicus respectfully submits that tattooing is a form of artistic expression that is fully protected under the First Amendment. It is an expressive art that is as ancient as the human capacity to communicate through words and visual symbols. The use of the human body as a canvas is art and employs a visual vocabulary that relates closely to the values and aesthetic ideas of people in particular cultures. Tattoos have many personal meanings to the individuals who wear them, and are also powerful ways of communicating identity, status, personal life histories, and social values. While tattoo is a visual art, it is also a kind of performance art like dance, music and theatre in that it is presented through living people. In the United States, tattooing has moved from an expression solely of protest and sub-cultural identity to a major art form recognized by museums, scholars, and major segments of the population. Artists with training in other media have taken up tattoo and greatly elevated the aesthetic and technical standards of the profession. Tattoos express both the creative and technical abilities of the artist as well as the expressive intentions of their clients. It is respectfully urged that the Court grant petitioner's request for a Writ of Certiorari.

Respectfully submitted,

DAVID M. ROSEN
Counsel of Record
RANDY KANDEL
MARK J. FOX
726 Argyle Road
Brooklyn, NY 11230
(718) 434-0610

Attorneys for Amicus Curiae

APPENDIX A — THE HISTORY OF TATTOOING

Tattooing was "invented" independently in many places throughout the world, reflecting a universal tendency for human beings to inscribe their bodies with meaningful signs that convey their social, cultural and individual identity.[1] Moreover, all of the permanent forms of marking the body, including tattooing, scarification, body shaping, and piercing that are found in the ancient world, continue in cultures around the world to the present day. In the societies where these practices occur, they are considered to be defining marks of humanity as well as specific signs of identity and individuality.

Tattooing has been abandoned in many parts of the world during the past four centuries, as Western ideas about the body have taken over. Clothing, ornaments, and other signs of status replaced tattooing as the primary means of indicating identity. Nevertheless anthropologists and historians have been able to gather information about various non-western tattoo practices from archaeological and ethnographic sources, including artworks that depict tattooing or that share the same aesthetic vocabulary as tattooing. Such artworks were a major component of the exhibition *Body Art: Marks of Identity* held at The American Museum of Natural History, November, 1999-June 2000.

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1. Scarification is similar to tattooing in that it involves the insertion of pigment and other substances under the skin. It was traditionally more common among dark skinned peoples in Africa and Melanesia. The tendency of skin with high melanin content to form colloids made this form of body decoration more popular in these regions. Decorative patterns of scars can also contain pigment to darken the skin. Today scarification is dying out in most parts of the world, while tattooing is increasingly popular with Black people in the United States.

Appendix A

Archaeological data include actual mummies bearing tattoos, tools for practicing tattooing and tomb paintings with images of tattooed people. Ceramic vessels and sculptures depict tattooing and scarification. Preserved textiles from ancient tombs have been found with depictions of decorated humans and with woven designs identical to body decoration. Even in ancient times body art was part of an aesthetic vocabulary that went across media — from ceramics to textiles to wall paintings to skin.

Along with symbolic speech, the capacity to create art, including body decoration, can be said to be the distinguishing characteristic of the human species. While there are no extant records of speech among the earliest humans, there is evidence of symbolic communication through art, including body art. The earliest evidence of art, dating to at least 30,000 B.P. (Before Present), consists of cave paintings, carved implements, and pigments that were probably used for body painting and possibly for tattooing. Many of the earliest cave paintings known, in North and South America, Europe, and Africa, include images of decorated bodies. Some of the earliest mummies known, found in Siberia (5th century B.C.), in western China (1st millennia B.C.), the Alps (c. 3300 B.C.) wear body paint and tattoos. The central Asian mummies show that at least 3000 years ago the skin of Caucasoid peoples in central Asia was decorated with rams, antelopes, and horses. Similar designs were woven into their textiles. Cave paintings and gold ornaments depict the same animals, reflecting the importance of these creatures in their material and spiritual lives. In Egypt, mummies from the 2nd millennium B.C, tomb paintings, and statuary show that female tattooing was associated with fertility. *See* Robert S. Bianchi, *Tattoo in Ancient Egypt* in *Marks of Civilization: Artistic Transformation of the Human Body 21* (A Rubin ed.1988). Images of Bes, a fertility God, appear as tattoos on the abdomens of figurines. Whether on sculptures, tomb

paintings, textiles, or on the body, ancient artists drew the symbols and ideas that were most meaningful to them.

While the archaeological record provides only a partial record of the many body art practices that have occurred throughout the world, it nevertheless demonstrates that peoples of all of the major populated regions of the world used body art in much the way modern and historic peoples have done. Among its many meanings, body art and especially tattooing, has been used to express identification with certain people and distinction from others. Such visible identification through body art enabled the members of a group to express their feelings of identity and standards of beauty. Simultaneously, others could see at a glance the ethnic group, gender and social status of the people with whom they interacted. The archaeological record also shows that over the centuries, as societies became increasingly complex and centralized, body art also became more complex because of the need to symbolize authority and signify an ever-greater number of roles and statuses. Rulers and nobles adorned themselves with symbols that helped define their position and authority. While jewelry and clothing were among the many symbols of status and identity, in the past, as today, the archaeological record demonstrates that tattooing was used as a marker of social status, identity, and individuality in many past cultures.

ETHNOGRAPHIC AND ETHNO-HISTORICAL SOURCES

Tattooing has meaning both to those who practice it and to those who repudiate it. Its highly charged capacity to communicate important social messages of inclusion and exclusion, and to highlight differences between cultures and sub-cultures, leads to strong sentiments on the part of both practitioners and non-tattooed observers. In some cultures and segments of society, and especially in the West, tattoo has been seen as exotic, bizarre, and uncivilized. Indeed,

until very recently, most descriptions of tattooing were written by people who did not practice it. The Greeks associated tattooing with their barbarian enemies, the Thracians, and the Romans followed them adopting the word *stigma* to describe body markings. *See* C. P. Jones, *Stigma and Tattoo* in *Written on the Body: The Tattoo in European and American History 1* (J. Caplan ed. 2000) and Mark Gustafson, *The Tattoo in the Later Roman Empire and Beyond* in Caplan, at 17-31.

When Europeans first encountered Indians in North America, tattoos featured prominently in their descriptions. These accounts were used to justify colonization and conversion of the Indians to Christianity. Two centuries later, the 1769 voyage of Captain Cook to the Pacific (not published until 1893), provided rich descriptions of the varied tattooing traditions of the Polynesians, but these accounts too expressed shock at the practice.

Nevertheless, anthropologists, historians, and art historians who have become increasingly interested in this subject are now able to show that the meaning of tattooing to those who practice it, in the West and elsewhere, is quite different from what it would appear to be if one relied only on the accounts of outsiders — in which tattoo is seen simply as a form of social deviance and non-conformity. In a classic study by the anthropologist Alfred Gell, comparing tattooing practices in different Polynesian societies, tattooing is described as a "social skin." *See* Alfred Gell, *Wrapping in Images: Tattooing in Polynesia* (1993). It played a key role in the social construction of the person. The body is used as a canvas to communicate messages about status, individuality, and a person's place in society. In most societies, tattoo designs were carefully prescribed (and proscribed), as was all art, in conformity with aesthetic standards and accepted symbolic meanings. Tattoos could confer political status, either marking high or low status. Among the Maori, for instance, in the past, only high status people underwent the painful

process of tattooing [Maori tattooing involved incising the skin]. In Japan, persons in certain occupations were tattooed, but they used tattoo to express relative status within their ranks, with the finest full body tattoos deserving of the most admiration and respect (and costing the most).

TATTOOS MARK PASSAGES AND EVENTS IN A PERSON'S LIFE

Tattoos in many societies were used to mark passages in a person's life, from childhood to adulthood, or special accomplishments such as exploits as a warrior or shaman. Gender was often differentiated through tattoos, with women, for example, in parts of Africa, receiving tattoos to mark their readiness for child bearing, or commemorating a birth. Tattooing could also be used to mark special occupational groups, as was the case in Japan where firefighters received special tattoos. And as we know from Western society, tattoos are often used to mark identification with certain sub-groups, either formally, as in fraternity tattoos, or with certain sub-groups of society. In many societies, including in the United States today, tattoos are used to record and affirm particular individual accomplishments. Among Plains Indians in North America, tattooing was often accompanied by a vision quest. The pain of receiving a tattoo was part of the spiritual exercise. Western tattoos also often affirm individual accomplishments, for instance a sailor's travels, a soldier's wartime accomplishments, special relationships to loved ones, and memories.

BODY ART AS A SIGN OF BEING CIVILIZED

Until Westernization and Christian missionaries prohibited tattooing in many parts of the world, people in many societies regarded tattooing and scarification, as well as other forms of permanent body modification, as signs of their humanity. A person was not considered fully socialized unless he or

she had undergone some form of body modification that distinguished human beings from uncivilized nature — from animals, for example, or from spirits of the wilderness. The Luba of the Democratic Republic of the Congo, among many other African people, believed a woman was not ready for marriage and child bearing until she had undergone scarification. Abdominal marks in elaborate patterns were signs of adulthood, fertility, and community membership and were also considered beautiful and sexually attractive. An unmarked woman was compared to a fish or a melon. *See* M. Nooter and A. F. Roberts, *Memory: Luba Art and the Making of History* (1996). The Baule people of Côte d'Ivoire, once regarded people without marks as being "of the bush," more like wild animals than civilized humans. *See* Susan Vogel, *Baule Scarification: The Mark of Civilization* in Rubin, *supra*, at 97-106.

The Tiv people of Nigeria said that adults who had not shaped their incisor teeth, another common body modification, were unable to "weave their words." *See* Paul Bohannan, *Beauty and Scarification Amongst the Tiv* in Rubin at *77-83.*

Many Native Americans regarded tattooing as a sign of accomplishment, such as bravery in war or an indication that a person had completed a spiritual quest. Images of specific animals, both real and mythical (such as the Thunderbird) indicated both family relationships and relationships with spirits. Arduous rituals accompanied these spirit quests and tattoos were part of the ritual as well as commemorations of the relationships. The display of this body art was a way for a person to communicate his or her status in society. The same images appeared on other objects, today considered to be great art: totem poles, masks, and textiles.

Appendix A

BODY ART AS VISUAL COMMUNICATION

Body art, including tattoos, can be understood as a visual language, but like all languages the signs and symbols are culturally specific. To understand the images in tattoo, one needs to know the vocabulary, including the shared symbols, myths, and social values that they express. While an anchor, a heart, a cross, or the word "MOM", is clear to most Westerners, this is only because of the shared cultural language they express. Elaborately pictorial Japanese tattooing started among men in certain occupational groups and depicts the exploits of a hero drawn from a Chinese epic called *Suikoden*. *See* A. Kitamura and K. Kitamura, *Bushido: Legacies of the Japanese Tattoo* (2001). The tattoos have more meaning to those who know the stories underlying the images than they do to people unfamiliar with the tales. Northwest Coast American Indian tattoos once depicted the relationships that members of specific families had with protective spiritual ancestors who were envisioned in animal form. Today such tattoos, along with Celtic signs and symbols, are adopted by Westerners who see them as signs of their longing for what they see as a simpler life.

Among some groups in central Borneo, including Kayan, Kenyah, and Iban people, tattoos were considered protective. Tattoo designs were considered so powerful that while women did, and in some places still do, the actual tattooing, only men were considered powerful enough to draw the designs. Tattoo pattern stamps were carved only by men whose souls were considered strong enough to handle the design's spiritual power. Designs including *aso*, or dragon-dog, serpentine scrolls and geometric patterns shielded people from harmful spirits believed to inhabit Borneo's rainforests. Some motifs were meant to cure illness and pain, particularly at arm or leg joints.

Appendix A

CHANGING MEANINGS OF TATTOO

The meaning of such practices shifts as designs and ornaments move across cultural boundaries. Maori tattoos in New Zealand, for example, now convey ethnic, rather than specific local tribal identities or high status in the traditional ranking system. When Borneo-style tattoos are adopted in the West this reflects a search for a connection to what is perceived to be a simpler way of life. The original meanings of particular designs, or the protective function of tattoos, may not be relevant in their new context, but the wearers and makers of such tattoos can and do attribute complex, if novel, meanings to them. In a world of increasing global communication, tattoo designs and motifs are adopted, shared, and reinterpreted as they move between cultures. The appropriation, imitation, and transformation of designs, motifs and materials are part of a continuous dialogue that goes on between cultures.

TATTOO ARTISTS AS SPECIALISTS

In all cultures, tattooists are specialists, as were carvers, weavers, musicians, and other accomplished artists. Becoming a tattoo artist involves a long process of training and apprenticeship. While anyone can make a mark in their skin and put pigment inside it, tattoos that are socially recognized and valued are expected to meet aesthetic standards and confer both beauty and meaning.

TATTOOING AS A CONSENSUAL COLLABORATIVE ACT

Tattooing is different from some but not all other art forms in that it is a collaborative act involving a consensus on the part of the tattoo artist and the recipient who offers his or her body as a canvas. There are instances in which tattooed marks (or brands) have been imposed on a person by

others — as for example the numbers inscribed on concentration camp victims by the Nazis in World War II, the brands put on slaves, or even the *stigmata* in early Christianity - but these marks cannot be considered tattoos as art in the sense discussed here. *See* Jones, *supra,* at 10. The tattoo artist cannot practice without the consent of the recipient and the recipient is thus part of the creative process. There are many forms of art in which this is the case. A composer who writes a symphony orchestra, a playwright, a screenwriter, or a choreographer, all rely on collaborations with others to realize their art. Tattoo should be seen in the same way — it is a creative composition requiring both a recipient and an artist. While after the work is completed the artist can be separated from the canvas, in creating the work, there has to be a consensual collaboration between the tattooist and the recipient of the tattoo.

APPENDIX B — TATTOO EXHIBITIONS AT MAJOR MUSEUMS

1971 **The Museum of American Folk Art,** New York. *Tattoo!*

1980 **Peabody Essex Museum,** *Salem, Ma. The Art of the Japanese Tattoo.*

1983 **The New Museum of Contemporary Art,** New York. *Jamie Summers: Metamorphic Rite.*

1985 **Marcato di Triani,** Rome. Exhibition curated by Ed Hardy, *L'asino e la Zebra*

1995 **The Drawing Center,** New York City. *Pierced Hearts and True Love: A Century of Drawings for Tattoos.* The exhibition also traveled to Williams College Museum of Art in Williamstown, Massachusetts (Sept.-Nov. 1996), the Joan Lehman Museum of Contemporary Art, Miami (Dec.-March 1996), and the Center for the Arts at Yerba Buena Gardens, San Francisco, (June-Aug. 1996), the Contemporary Art Center, Cincinnati, OH; Vancouver Art Museum, Vancouver, B.C.; Edmonton Art Gallery, Edmonton, Alberta.

1995 **The South Street Seaport Museum,** The Devil's Blue American Tattoo Art and Practice Through the Port of New York; The South Street Seaport Museum

1997 **Boulder Museum of Contemporary Art,** Colorado. *Art and Provocation: Images from Rebels*

1998 **Boulder Museum of Contemporary Art,** Colorado. *Some Weird Beauty*

1998 **The Mariner's Museum,** Newport, Virginia. *Skin Deep: The Art of the Tattoo.*

Appendix B

1999 **The South Street Seaport Museum**, New York. *American Tattoo: The Art of Gus Wagner.*

1999 **The American Museum of Natural History**, New York. *Body Art: Marks of Identity.*

1999. **Museum of Anthropology. University of Pennsylvania**. Body Art on-line.

2000 **The Victoria and Albert Museum**, London, England "Day of Record" April 29, 2000 attended by more than 1500 people.

2000. **The Australian National Museum**. *Body Art.* This exhibition traveled to the South Australian Museum (Adelaide), the Melbourne Museum, the Queensland Museum (Brisbane), the Newcastle Regional Museum, the Auckland War memorial museum, and the Australian Museum ("Body Art II").

2002. **National Maritime Museum**, Greenwich, England. *Skin Deep: A History of Tattooing.*

2002. **The Pitt-Rivers Museum of Anthropology**, Oxford University, Oxford, England. Permanent exhibition, *Body Arts* on April 20, 2002.

APPENDIX C — SCHOLARLY SYMPOSIA ON THE ART OF TATTOOING:

1983. A symposium entitled *Arts of the Body* was held at **The Fowler Museum of Cultural History at UCLA**. *Marks of Civilization: Artistic Transformations of the Human Body* edited by Arnold Rubin is an anthology of articles presented at the symposium. Participants included art historians and anthropologists including the late Arnold Rubin (Art Historian, UCLA), Susan Vogel (Art Historian, Director of The Museum For African Art, New York City); James Faris, Anthropologist, The University of Connecticut; Adrienne Kaeppler, Anthropologist, National Museum of Natural History, Smithsonian Institution, and others.

2000 **The American Museum of Natural History** in New York City held a day-long public symposium on March 18, 2000. "The Changing World of Tattoo: A Panel Discussion" moderated by Anne Fitzgerald included tattoo artists Lyle Tuttle, tattoo artist, art collector and creator of the Tattoo Art Museum and Hall of Fame, Ukiah, CA, Pat Sinatra, writer, lecturer and tattoo artist, Woodstock, NY; Ed Hardy, tattoo artist, writer and curator, San Francisco, CA; Keone Nunes, lecturer on Hawaiian culture and traditional Polynesian tattooist, Wai'anae, HA.; Mike McCabe, writer, cultural anthropologist and tattoo artist, New York City, NY; Chuck Eldridge, tattoo artist, writer, archivist and historian, Berkeley, CA; Jacci Gresham, tattoo artist, New Orleans, LA; Sean Vasquez, tattoo artist, New York City, NY; Michelle Myles, tattoo artist, New York City, NY.

2000 **The American Museum of Natural History** held a lecture series in conjunction with the Body Art exhibition featuring talks by scholars including historians Jane Caplan, Dorothy Ko, Valerie Steele, Enid Schildkrout and Daniel Wojcik, anthropologists.

Appendix C

2001 **The South Street Seaport Museum**. Inaugural lecture for Gus Wagner exhibit, given by Anne Fitzgerald, Senior Researcher, American Museum of Natural History.

2002 **The Metropolitan Museum of Art**, in conjunction with the exhibition *Extreme Beauty* held a symposium that included a lecture by Ann Fitzgerald, Senior Researcher at The American Museum of Natural History, on tattoo.

2002 **Tulane University**, *Embodied Identities: Body Art, Culture, and the Material World.* The Henry Stern Lecture, given by Dr. Enid Schildkrout.

2002. **The Pitt Rivers Museum** in Oxford, England, held a conference on *Body Arts and Modernity.* Scholars from the disciplines of anthropology, history and art history gathered to consider the topic which was described as follows: "Anthropologists have written much about the elaborate body arts traditionally practiced in different parts of the world. They have shown how what, in the West, is often considered to be a merely superficial aesthetic form is in reality deeply implicated in indigenous politics and cosmology, in morality and in the constitution of self. Much less attention has been given to the degree to which body arts today intersect with, are revitalized by, or constituted through, modernity and modern practices. The purpose of the colloquium is to interrogate this issue, drawing upon case studies from throughout the world."

2002 **The University of Iowa**. *The Cultured Body: African Fashion and Body Arts* (October 2002).

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IN THE

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RONALD P. WHITE,

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v.

SOUTH CAROLINA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF *AMICUS CURIAE* CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

RENEE L. GIACHINO *
REID ALAN COX
CENTER FOR INDIVIDUAL FREEDOM
901 N. Washington Street, Suite 402
Alexandria, VA 22314
(703) 535-5836

KINGSLEY R. BROWNE
WAYNE STATE UNIVERSITY
LAW SCHOOL
471 W. Palmer Avenue
Detroit, MI 48202
(313) 577-0476

* Counsel of Record

Counsel for *Amicus Curiae*

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INTEREST OF *AMICUS CURIAE* [1]

The Center for Individual Freedom (the "Center") is a non-partisan, non-profit organization with the mission to protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution, including, but not limited to, free expression rights, property rights, privacy rights, freedom of association, and religious freedoms. Of particular importance to the Center in this case is the need to vigilantly safeguard an individual's constitutionally protected right of free expression without regard to the medium employed.

[1] This brief is filed with the written consent of both parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

If ever there has been a case that merited summary reversal by this Court, this is the case. The decision below [2] squares with neither this Court's long-standing constitutional protection for artistic expression under the Free Speech and Free Press clauses of the First Amendment nor this Court's precedents applying First Amendment analysis to "time, place, or manner" restrictions.

The central flaw in the South Carolina Supreme Court's decision is not that it erred in crafting a balance between the expressive interests of tattoo artists and their clients, on the one hand, and the State's interest in public health and safety, on the other. Rather, the court refused to engage in any examination of the Petitioner's expressive interests at all on the erroneous grounds that, in the absence of some "particularized message," tattooing simply is not expression and, even if it were, the State's asserted interest in public health and safety obviates the need to engage in First Amendment analysis.

This Court's precedents make clear the dual error of the state court's analysis. First, constitutional protection under the First Amendment extends to artistic expression even when the art does not convey "a narrow, succinctly articulable message." Second, a state's assertion of a public health and safety interest does not preempt First Amendment scrutiny; instead, the asserted interest is an integral part of that analysis. Had the court below properly examined the regulation as a "time, place, or manner" restriction, it would have been compelled to strike it down because a complete

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[2] The South Carolina Supreme Court upheld Petitioner Ronald P. White's conviction for engaging in the art of tattooing. *See State v. White*, 348 S.C. 532, 560 S.E.2d 420 (2002). The State of South Carolina completely bans and criminalizes tattooing by anyone other than a licensed physician or surgeon, and even then it is allowable only when medically necessary. *See* S.C. CODE ANN. § 16-17-700.

ban on the art of tattooing is not "narrowly tailored" to advance the State's legitimate interest in public health and safety.

ARGUMENT

I. THE SOUTH CAROLINA SUPREME COURT'S REFUSAL TO RECOGNIZE FIRST AMENDMENT PROTECTION FOR THE ART OF TATTOOING DISREGARDS THIS COURT'S PRECEDENT.

Faced with this Court's well-established precedents to the contrary, the South Carolina Supreme Court held that the First Amendment is inapplicable to artistic expression unless the art at issue "is 'sufficiently imbued with elements of communication.'" *State v. White*, 348 S.C. 532, 538, 560 S.E.2d 420, 423 (2002) (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). Applying this standard, the court below found that the art of tattooing is not expression "within the boundaries of [the] First Amendment" because "tattoo[ing] is not sufficiently communicative to warrant [constitutional] protection[ ]." *White*, 348 S.C. at 537-538, 560 S.E.2d at 423. This decision stands in stark conflict with this Court's unanimous pronouncement in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995), that "a narrow, succinctly articulable message is not a condition of constitutional protection" for expression under the First Amendment.[3] *Id.* at 569.

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[3] The South Carolina court was led astray by its failure to appreciate the nature of the issue in *Spence v. Washington*, 418 U.S. 405 (1974), which was an "as applied" challenge to a statute aimed generally at "conduct." The *Spence* Court's examination of the communicative nature of Spence's conduct—taping a peace sign on a flag—came in the context of deciding whether a regulation not aimed primarily at expression could constitutionally be applied to someone who claimed that his particular violation of the law was for expressive purposes. Such a claim necessarily requires an analysis of whether his conduct conveyed a discernible

For more than a half century, this Court has consistently held that the umbrella of the First Amendment shields artistic expression without regard to the medium employed by the artist, *see, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (First Amendment protection for motion pictures), or whether the art "convey[s] a 'particularized message,'" *Hurley*, 515 U.S. at 569 (quoting *Spence*, 418 U.S. at 411). Specifically, this Court has noted that First Amendment protections unequivocally extend to "pictures, films, paintings, drawings, and engravings," *Kaplan v. California*, 413 U.S. 115, 119-20 (1973), as well as live and recorded entertainment, including motion pictures, radio and television programs, and musical and dramatic works, *see Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981). Thus, the freedom of expression protected under the First Amendment reaches "beyond written and spoken words as mediums of expression . . . and unquestionably shield[s] [the] painting of Jackson Pollock, [the] music of Arnold Schoenberg, [and the] Jabberwocky verse of Lewis Carroll." *Hurley*, 515 U.S. at 569. Were the South Carolina court's analysis to prevail, much of the most critically acclaimed art and literature would lose its constitutional protection by virtue of the critics' inability to agree about what message it conveys.

If painting and verse, and even an offensive slogan emblazoned on a jacket, are "unquestionably shielded" by the First Amendment's freedom of expression, then so, too, must the tattoo art created by Petitioner Ronald P. White. *Id.*; *see also Cohen v. California*, 403 U.S. 15 (1971). After all, the only difference between the Petitioner's art and the "unquestionably shielded" painting, verse, and slogan is the medium employed by the artist. Petitioner has simply chosen

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message. This case, however, is a facial challenge to a restriction banning what is asserted to be an entire class of expression, so the question is simply whether it is expression, not whether it is the expression of a clearly discernible particularized message.

to execute his art on the skin of individuals who commission the art rather than on canvas or paper. While such a distinction in artistic medium may implicate different state regulatory interests, it does not remove the resulting expression from the purview of the First Amendment. Therefore, this Court's intervention is necessary to establish that the First Amendment's protection of an individual's right of artistic expression extends beyond particularized messages conveyed via traditional media.

II. SOUTH CAROLINA'S LEGITIMATE PUBLIC HEALTH INTEREST IN REGULATING THE ART OF TATTOOING DOES NOT COMPLETELY EXEMPT THE RESTRICTION FROM SCRUTINY UNDER THE FIRST AMENDMENT.

The decision below rejects application of any First Amendment scrutiny whenever a state invokes public health and safety interests to justify a challenged regulation, even when the restriction burdens constitutionally protected expression. Specifically, the South Carolina Supreme Court held that the State's ban and criminalization of the art of tattooing was wholly immune from First Amendment scrutiny because the "invasion of human tissue" implicated the State's interest in the "protection of public health and general welfare." *White*, 348 S.C. at 538-39, 560 S.E.2d at 423-24. This analysis is flatly inconsistent with this Court's precedents, which require an examination of a state's articulated interest as an integral part of the First Amendment scrutiny applicable to all restrictions that burden expression. *See, e.g., Turner Broad. Sys., Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 662 (1994).

This Court has never held that a state's asserted interest in public health and safety exempts a regulation that burdens expression from all First Amendment scrutiny. Rather, a state's interest is an important part of the First Amendment

calculus, and an examination of that interest is necessary even when the asserted interest concerns public health and safety. For example, in *Hill v. Colorado*, 530 U.S. 703 (2000), this Court subjected a statute restricting expression near abortion clinics to First Amendment scrutiny notwithstanding the unquestioned legitimacy of the states' interest in "protect[ing] the health and safety of their citizens." *Id.* at 715 (citation omitted). The statute was upheld not simply because it was intended to protect health and safety but because it satisfied the requirements that this Court has established for laws regulating the "time, place, or manner" of expression. The South Carolina Supreme Court, however, never engaged in that critical inquiry.

III. SOUTH CAROLINA'S BAN ON THE ART OF TATTOOING CANNOT BE UPHELD AS A VALID TIME, PLACE, OR MANNER RESTRICTION.

Despite this Court's clear mandate that "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions," *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000), the court below relied on "a general presumption of validity for legislative acts when subjected to constitutional attack, which can be overcome only by a clear showing that the act violates some provision of the Constitution," *White*, 348 S.C. at 536, 560 S.E.2d at 422. Only when the challenging party can show that there is "'no room for reasonable doubt that it violates some provision of the Constitution,'" the court held, does the burden shift to the state to defend it. *Id.* at 537, 560 S.E.2d at 422 (citation omitted). With all due respect to the South Carolina court, *Amicus* submits that the court placed the burden of proof on the wrong party.

Once the burden is placed where it belongs, the unconstitutionality of the restriction could not be more obvious. When a regulation that restrains expression "is justified without reference to the content of [the] regulated speech," *Hill*, 530 U.S. at 720, it is subject to intermediate scrutiny under the First Amendment and is constitutionally permissible only when "'it furthers an important or substantial governmental interest; . . . the governmental interest is unrelated to the suppression of free expression; and . . . the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest,'" *Turner Broad. Sys., Inc.*, 512 U.S. at 662 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).[4] The regulation must also leave open ample alternative channels for expression. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791, 797-98 (1989); *accord Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). It was the obligation of the State to establish that its restriction satisfies these requirements, but the court below did not require the State to carry that burden.

The South Carolina statute can satisfy some of the "time, place, or manner" requirements, but it plainly cannot satisfy all of them. Assuming the State's interest was in fact to protect public health and safety—as opposed to singling out a particular art form because of its traditional association with outcasts or its incompatibility with orthodox religious beliefs—that interest is legitimate and unrelated to the content

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[4] This Court has noted that "the four-factor standard of *United States v. O'Brien*, 391 U.S. 367 (1968), for validating a regulation of expressive conduct . . . is little, if any, different from the standard applied to time, place, or manner restrictions." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984). Nonetheless, it should be noted that the encroachments on expression challenged in *O'Brien* and *Clark* targeted predominantly non-expressive conduct—burning a draft card and camping in a public park, respectively—and, unlike the South Carolina restriction, only incidentally limited constitutionally protected expression.

of any particular tattoo. However, there is no evidence in the record below that a complete ban and criminalization of the art of tattooing leaves open ample alternative channels of expression.

The restriction most clearly founders with regard to the requirements that it actually *further* the State's legitimate interest and restrict no more speech than necessary in doing so. The extent to which the statute actually furthers the State's interest in public health and safety remains a mystery because, as the state court noted, the State "failed to introduce current evidence of the risks associated with tattoos." *White*, 348 S.C. at 540, 560 S.E.2d at 424. Thus, whether the restriction *substantially* furthers the State's *important* interest is impossible to ascertain, and the restriction should be struck down on that ground alone.

The restriction also plainly fails to satisfy the narrow tailoring requirement. The means utilized to further the State's asserted interest must not be "substantially broader than necessary to achieve the government's interest," *Ward*, 491 U.S. at 800, and may not "burden substantially more speech than . . . necessary to further the government's legitimate interest[ ]," *id.* at 799. Thus, "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Id.* (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). Under this standard and given the record below, South Carolina's ban and criminalization of an entire art form is extraordinarily overbroad.

South Carolina, having passed its regulation in 1966, is one of only two remaining states that completely ban the art of tattooing. *See* OKLA. STAT. tit. 21, § 841; S.C. CODE ANN. § 16-17-700. At least one similar restriction was recently struck down as violating the First Amendment. *See Lanphear v. Massachusetts*, No. 99-1896-B (Super. Ct., Suffolk County,

Mass., Oct. 20, 2000) (declaring a Massachusetts statute banning the art of tattooing "void as violative of the First Amendment"). A complete ban appears substantially broader than necessary to achieve the State's asserted interest in public health and safety because modern sterilization techniques can ensure the safety of tattooing without foreclosing the entire art form as an expressive medium. The very fact that only two states retain statutes completely banning the art of tattooing strongly suggests that South Carolina's ban impermissibly burdens substantially more expression than necessary. In short, South Carolina has not proved—and probably cannot prove—that its legitimate asserted interest in public health and safety would be achieved less effectively absent a complete ban. After all, forty-eight states have chosen substantially less restrictive means, such as sterilization and licensing requirements, to protect their citizens from any dangers associated with the art of tattooing, and South Carolina has provided no explanation at all for why the course chosen by almost all other states would fail to protect its legitimate interests. Therefore, South Carolina's chosen means—banning and criminalizing an entire art form—are constitutionally impermissible.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

RENEE L. GIACHINO *
REID ALAN COX
CENTER FOR INDIVIDUAL FREEDOM
901 N. Washington Street, Suite 402
Alexandria, VA 22314
(703) 535-5836

KINGSLEY R. BROWNE
WAYNE STATE UNIVERSITY
LAW SCHOOL
471 W. Palmer Avenue
Detroit, MI 48202
(313) 577-0476

* Counsel of Record

Counsel for *Amicus Curiae*

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No. 01-1859

In The
Supreme Court of the United States

RONALD P. WHITE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

On Petition For Writ Of Certiorari To The South Carolina Supreme Court

BRIEF OF AMICI CURIAE ALLIANCE OF PROFESSIONAL TATTOOISTS, INC. AND THE NATIONAL TATTOO ASSOCIATION, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MARC M. HARROLD
111 South Highland
Suite 336
Memphis, TN 38111
(901) 525-3082

GEORGE COCHRAN
Counsel of Record
University, MS 38677
(662) 915-7361

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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MISCELLANEOUS:

Alliance of Professional Tattooists (*http://www.safetattoos.com*) 1

National Institute of Environmental Health Sciences (*http://www.nieh.nih.gov/external/faq/tattoo.htm*) 2

National Tattoo Association (*http://www.nationaltattooassociation.com*) 2

INTEREST OF AMICI CURIAE[1]

Amici – collectively, the "Tattoo Associations," are two national, non-profit organizations involved with the international advancement of the art of tattooing generally and the development of increased social awareness of tattooing as an art form, increased quality and professionalism throughout the artistic and commercial tattooing community world-wide, and increased health and safety in the art of tattooing.

(1) THE ALLIANCE OF PROFESSIONAL TATTOOISTS, INC. ("APT") is a non-profit educational organization founded in 1992 to address health and safety issues involved in the art of tattooing. APT has been a leader in the development, advancement and training of safety measures for tattoo artists throughout the United States, Canada and Europe. For more information, *see*, www.safe-tattoos.com. As a testament to APT's prominence in tattooing-safety, The National Institute of Environmental Health Science, a component of the United States Department of Health and Human Services (DHHS), advises individuals interested in getting a tattoo to determine whether the tattoo-parlor is APT certified. "Another way to ensure safety is to check whether the tattooist at a particular parlor has been certified by the Alliance of Professional Tattooists (APT). This nonprofit professional organization has developed a set of infection control guidelines, in association with the

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[1] This brief is filed with the written consent of all parties. Written consent is filed with this Court. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici curiae*, their members or their counsel, make a monetary contribution to the preparation or submission of this brief.

FDA, for its members to follow." National Institute of Environmental Health Science website, www.niehs.nih.gov/external/faq/tattoo.htm (visited July 28, 2002).

(2) THE NATIONAL TATTOO ASSOCIATION, INC. ("NTA") is a non-profit organization founded in 1976 whose focus is to heighten social awareness of tattooing as a contemporary art form and advance the quality, safety and professionalism involving the art of tattooing in the tattooing community worldwide. For more information, *see*, www.nationaltattooassociation.com.

As the instant case directly deals with whether tattooing is a protected art form under the First Amendment of the United States Constitution, and the sufficiency of safety regulations instead of an outright prohibition, both Tattoo Associations have a direct interest in the outcome of this case as it goes to the underlying art form that is the sole reason for the formation of each Alliance or Association, respectively, and is the underlying interest of the entire body of members of both Tattoo Associations.

The interest of the Tattoo Associations can be simply stated: to protect and preserve the art form that they practice and love. While tattooing is one of the oldest art forms known to mankind, whether it is protected under the First Amendment is an issue of first impression before this Court.

REASONS FOR GRANTING THE WRIT

This Court should grant the *Writ* on this issue of first impression before it because:

(1) "[a] State court . . . has decided an important question of federal law that has not been, but should be, settled by this Court." Rule 10(c)

(2) "[a] State court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c)

INTRODUCTION

The South Carolina Supreme Court stated, "tattooing . . . is unique in that it involves invasion of human tissue and, therefore, may be subject to state regulation to which other art forms (on non-human mediums) may not be lawfully subjected." Petitioner's Appendix at 6a.

The Tattoo Associations agree wholeheartedly with the South Carolina Supreme Court that: (1) tattooing "may be subject to state regulation," *Id.*; and (2) it is an "art form. . . ." *Id.* The Tattoo Associations disagree, however, with the proposition that the minimal health risks involved in tattooing either detract from First Amendment protections or warrant a total ban, as currently imposed by the State of South Carolina.

I. THE *PROCESS* OF TATTOOING IS PROTECTED ART UNDER THE FIRST AMENDMENT.

Although all Justices of the lower court agree that tattooing is a form of art, Petitioner's Appendix at 6a, 10a, the majority holds that the act (as compared to the final product) of tattooing "falls on the unprotected side" of the First Amendment. *Id.* at 7a. The process of tattooing, however, is "inseparably intertwined," *Bery v. City of New*

York, 97 F.3d 689, 695 (2d Cir. 1996) (internal citations omitted), with the message that exists in the finished product and, as such, warrants either mid-level review as speech/conduct under *United States v. O'Brien*, 391 U.S. 367 (1968) or review as a non-content based restriction on First Amendment rights. Specifically, as pointed out by the dissent below:

> The majority, by its emphasis of the word "process," appears to indicate that although the process of tattooing is not "speech," the end product thereof may be, such that the tattoo wearer may be entitled to First Amendment protection as the conveyor of a message. In my view, this is akin to saying that an author who is paid a commission to write a book by a publisher, or an artist commissioned to paint a rendering[,] does not engage in speech, but that the publisher, and purchaser of the painting, do engage in speech. I find such an analysis completely untenable.

Petitioner's Appendix at 12a, n.9.

The simple fact that a "health" interest may exist in the process portion of the art does not mean that it is any less communicative than art that involves a more traditional "canvas." It also does not alter the amount of constitutional protection that is due under the First Amendment. It simply means that the state's "health interest" will have to be balanced against an artistic process under the appropriate level of constitutional scrutiny to determine if the outright ban currently enforced by the state is permissible under the First Amendment. Whether tattooing is entitled to any First Amendment protection is an important question of federal law that must be settled by this Court.

II. THE *WRIT* SHOULD BE CONSIDERED AS IT RELATES TO MODERN TATTOOING.

"Over the last several decades the cultural status of tattooing has steadily evolved and is now accepted by a broader segment of society." *Lanphear v. Massachusetts,* Sup. Ct., Suffolk County, Case No. 99-1896-B (2000) (internal citations omitted).[2] Part of this acceptance is due to the remarkable advances in tattooing safety.

The Tattoo Associations provide information on the alleged "risks" of tattooing as well as the safety procedures that comprise modern tattooing in Appendix A (*attached*) so that this Court can consider the advanced, modern art of tattooing practiced in this country today.[3] Information is

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[2] Currently, South Carolina and Oklahoma are the only two states that outlaw tattooing instead of regulating it. In *Lanphear*, a Massachusetts state court held that the Massachusetts tattoo ban violated the First Amendment and article 16 of the Massachusetts Declaration of Rights. *Lanphear v. Massachusetts*, Sup. Ct., Suffolk County, Case No. 99-1896-B (2000) ("The act of creating a tattoo is intrinsically part of the expressive content of the art.") The Massachusetts law was later repealed.

[3] For purposes here, we will recognize "health and safety" as the State's asserted interest though it is clear that this is not the actual interest of the state. Senator Jake Knotts, who has been the main opponent of legalized, regulated tattooing in South Carolina as a member of both the State House and Senate, has repeatedly stated that it is religion, and not safety, that is the primary basis for the law. The religious opposition to tattooing is based in *Leviticus* 19:28 Bible, *King James version* ("You shall not make any cuttings in your flesh . . . nor any marks upon you. I am the Lord.") Knotts has stated openly, "[i]f the Lord wanted you to have a tattoo, he would have put it on you." Associated Press, *S.C. High Court Scrutinizes State's Tattoo Ban*, Nov. 15, 2002, *viewed on* www.freedomforum.org/templates/document.asp (visited Aug. 12, 2002). *See, also,* Chris Haire, *Ink Stink*, MetroBeat, May 7, 2002, *quoting Jake Knotts* ("It's in the Old Testament. You either

(Continued on following page)

also included that shows that the "underground" tattooing that results from this type of outright ban is far more dangerous than regulated tattooing. No court, at any time in this matter, has heard any actual evidence of health risks related to tattooing. Petitioner's Appendix at 2a. ("The trial court did not hear any expert medical testimony regarding the dangers of tattooing or the risks to public health caused by the process of tattooing."). In a state that does not require adult motorcycle riders to wear helmets,[4] South Carolina's safety argument appears especially hollow.

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believe in the Bible or not.") *Robert S. Greenberger,* Tattoo Taboo, Wall Street Journal, July 22, 2002, *quoting Jake Knotts.* ("If God wanted you to have a tattoo, he'd have put your name on you.") On the CBS "Early" Show, Knotts did not mention religion or safety, instead stating that tattooing was something that "we don't need" in South Carolina. 2002 Burrelle's Information Svcs., CBS News Transcripts, *The Early Show, CBS,* July 30, 2002. Knotts stated that the law was good because it gave people a chance to think about getting a tattoo as they drove to Georgia. *Id.* It is not clear why the same health concerns would not exist in Georgia or North Carolina, or why Knotts would encourage people to travel to get a tattoo if the risks actually exist. Knotts also stated that the law "preyed on our [state's] younger generation." *Id.* (Knotts did not mention that regulations would almost certainly include a restriction against tattooing minors.) Knotts asserted that "the people in South Carolina does [sic] not want their beaches with tattoo parlors popping up . . . ." *Id.* (Knotts ignores the availability of zoning provisions to address this problem.) Finally, Knotts stated that tattoos are "worse than drugs, really because you can go and get rehabilitated from drugs . . . ." *Id.*

[4] South Carolina Code of Laws § 56-5-3660.

CONCLUSION

It seems overly-dramatic to speak of persecuted artists and banned art forms in twenty-first century America. It has become instinctive under First Amendment jurisprudence that art receives more than low-scrutiny review. This issue, as it relates to other art forms, has been clearly settled by this Court in the past. *See, e.g., Kaplan v. California,* 413 U.S. 115, 119-20 (1973) ("As with pictures, films, paintings, drawings, and engraving, both oral utterance and the printed word have First Amendment protection. . . .") Tattooing deserves a chance to prove itself.

This law is not in place to protect people from any risks that may occur in modern tattooing. It remains in place for reasons of social and religious intolerance.[5] Regulations are clearly sufficient to address any risks that actually do exist. An outright ban is not necessary, justified or constitutional.

For the foregoing reasons, amici request that the writ be granted.

Respectfully submitted,

MARC M. HARROLD
111 South Highland
Suite 336
Memphis, TN 38111
(901) 525-3082

GEORGE COCHRAN
Counsel of Record
University, MS 38677
(662) 915-7361

[5] *See supra,* note 3 and accompanying text.

APPENDIX A

TATTOOING HEALTH RISKS AND SAFETY PROCEDURES

(a) The Health "Risks" Involved in Modern Tattooing:

It is simply not clear or proven that there are any significant risks when tattooing is performed in a professional manner utilizing modern safety measures. The National Institute of Environmental Health Science, a component of the United States Department of Health and Human Services (DHHS) expressly states on its website, responding to a question related to the risk of getting a tattoo: "If appropriate disinfection and sterilization techniques are used, the health risk associated with tattooing is small." *National Institute of Environmental Health Science* website, (www.niehs.nih.gov/external/faq/tattoo.htm) (visited July 28, 2002).

It seems obvious that some "risk" could be involved whenever the skin is broken and blood is involved in any way. This would be true of medical and dental care, the donation of blood, body-piercing, (including simple ear-piercing) and acupuncture, to name just a few such activities. Any "risks" of infection that are involved in "unsanitary" tattoo-parlors generally, are inherent (by definition) to "unsanitary" conditions, and not limited to, related to, or inherent to, the art of tattooing. Concern over the "sanitary" nature of tattooing would tend to lean towards, and not away from, regulated tattooing, in light of the evidence of "underground" and thus unregulated tattoo parlors. The Commonwealth of Massachusetts, in defending its similar tattooing-prohibition before the Massachusetts Supreme Court conceded that, "[a]lthough tattooing

is an invasive procedure and therefore has a higher risk of infection than non-invasive procedures, . . . the risks from unsanitary tattooing establishments are similar in nature to those associated with barber shops and restaurants." *Lanphear v. Massachusetts,* Sup. Ct., Suffolk County, Case No. 99-1896-B (2000).

The "risks" involved in tattooing, to the degree that they may actually exist, are related to the transmission of bloodborne pathogens and the potential of spreading diseases and infections such as AIDS and Hepatitis B & C.

(1) HIV/AIDS: "Tattooing is generally safe if performed by a reliable tattooist who follows proper hygiene and safety standards. There are no reported cases of tattooing causing HIV/AIDS." *Patrick J. Bird, Ph.D.,* University of Florida College of Health and Human Performance, Keeping Fit, University of Florida Website, www.hhp.ufl.edu/keepingfit/ARTICLE/TATTOO.html (visited July 31, 2002); *See also, Tattooing and Health Risk: What the Statistics Say,* Tattoo Artist website, www.tattooartist.com/health.html (visited July 31, 2002) (stating expressly "[n]o case of AIDS transmission ever documented in a U.S. tattoo studio."); *Center for Disease Control – CDC – HIV/AIDS Surveillance Report, 1997 entitled, "Estimated Incidence of AIDS and deaths of persons with AIDS – U.S. Jan. 1985 – June 1997"* (viewed at www.tattooartist.com/health.html) ("In its HIV/AIDS Surveillance Reports, CDC has consistently noted that it has documented 'no cases of HIV transmission through tattooing' anywhere in the country since it began tracking such data in 1985.") By comparison there have been at least 7 HIV transmissions associated with dentists and dental workers. *See* www.tattooartist.com/health.html (visited July 31, 2002). "HIV is a very delicate virus and

does not survive long outside the human body." *Tattoo Studio Guide,* www.tattoostudioguide.com/tattoo_faq.html (visited July 31, 2002).

(2) Hepatitis B & C:

Tattooing, when performed in a professional and careful manner, does not pose a significant risk of the spread of Hepatitis B & C or any other blood-borne illness. The Center for Disease Control ("CDC") located in Atlanta, Georgia classifies tattoo artists as "Personal Service Workers," ("PSW") a classification that also includes hairdressers, barbers, manicurists, acupuncturists, and massage therapists. "[N]o data exist [sic] in the United States indicating that persons with exposures to tattooing alone are at an increase[1] risk for HCV infection." *CDC Website*, www.cdc.gov/ncidod/diseases/hepatitis/c/tattoo.html (visited Aug. 14, 2002). "If the tattooist follows proper cleanliness and sterilization procedures – and the customer takes proper care of the tattoo in the days following the procedure while the skin is healing – the risk of contracting any kind of blood-borne illness is minimal." *Eskild Peterson, M.D., Chief, Infectious Diseases Section,* The University of Arizona College of Medicine, Tucson, www.ahsc.arizona.edu/opa/answers/liver.html (visited Aug. 14, 2002).

(b) Modern Tattooing Safety Measures:

"The last ten years have seen an educational renaissance within the tattoo industry." *Courtesy of the Alliance of Professional Tattooists*, Tattooing Advice www.tattoo studioguide.com/tattoo_faq.html (visited July 31, 2002).

(i) *Autoclave* – a machine that allows the tattoo artist to sterilize tattooing equipment. An autoclave uses a combination of heat, steam and pressure to kill all known pathogenic micro-organisms. There is a standard temperature and pressure that is used throughout the professional tattooing community: 270 degrees Fahrenheit at 35 psi.

(ii) *Single Service Equipment* – Each needle and tube set used in the tattooing process is individually packaged, dated and sealed. Each needle and tube used is sterilized in an autoclave before use. A small icon on the equipment packaging will change color when proper sterilization has occurred. A steam heat indicator ensures sterilization. No piece of equipment is used more than once. All needles, tubes, and tools are stored in a sealed paper or a plastic bag that is not opened until ready for use on an individual client. The client can observe the single use of each piece of equipment by being present when each sealed paper or bag is opened. The disposal of each piece of tattooing equipment is done in the customer's presence to ensure that the equipment is properly disposed of.

(iii) *Spore Test* – A spore test is a biological test that checks the efficiency of the autoclave. The spore test results are then displayed in the tattoo studio.

(iv) *Ultra-sonic Cleaner* – Tubes and any reusable equipment is cleaned in an ultrasonic cleaner. This cleaning method is far superior to hand-washing and scrubbing. Over-spray and splatter are eliminated through this method thus leading to sterile conditions.

(v) *Barriers* – Several "barriers" are used in modern tattooing. A moisture-resistant barrier covers the entire work area. This barrier is used for setting out ink caps, ointments, and the tattooing machine during operation.

This barrier prevents contamination of the work-area. Except for the machine tube, (which is sterilized in the autoclave) barriers are mandatory for all equipment which will be re-used in any manner. This includes the "clip cord" to avoid any cross-contamination between tattoos.

(vi) *Squeeze Bottle* – Tattoo artists use a squeeze bottle instead of a spray bottle for the soap used in the tattooing process. A spray bottle causes over-spray which can cross-contaminate the work area.

(vii) *"Disposables"* – Every item used in tattooing that can be disposed of is. This includes the ink caps which hold pigments used in tattooing, the stencil, wash cups used for cleaning machine tubes between colors, razors used to prep the tattooing area, non-latex gloves. Needles are specifically disposed of in a "sharps container" used in every industry which employs the use of needles.

(viii) *Single Material "Dipping"* – All ointments, petroleum jelly, and pigments are always dispersed before tattooing. The tattoo artist does not reach back into the jar or for the bottle. If new ointments or pigments are needed, new gloves, ointment sticks, ink caps are used instead of "reaching back" into previously used ointment sticks or ink caps.

(ix) *Disposable Gloves* – Tattoo artists use disposable gloves throughout the tattooing process.

(x) *Sharps Container* – A "sharps container" safely stores contaminated sharps before they are picked up for proper disposal. Proper bio-medical procedures are followed for disposal. These bio-medical procedures are identical to "sharps" and needles used in numerous other procedures (medical, dental, etc.).

(xi) *Universal Precautions* – OSHA Procedure: The Occupational Safety and Health Administration (OSHA) issues regulations for individuals who come into contact with blood and other contaminating substances in the workplace. The OSHA regulations, entitled, "Universal Precautions," are utilized throughout the United States in numerous occupations and workplaces where exposure is a concern. The American Red Cross (Red Cross) offers an on-line course entitled, "Universal Precautions for Tattoo Artists and Body Piercers" that teaches the use and application of the OSHA "Universal Precautions" specifically in the context of tattooing. This on-line course can be completed at the convenience of the tattoo artist from any on-line access. *See, e.g.,* American Red Cross website, www2.redcross-indy.org/hss/bbp-tattoo/intro1.asp (visited Aug. 1, 2002). There are a variety of ways that tattoo artists can learn and utilize the "Universal Precaution" standards that are extensively used by tattoo artists to ensure safety.

(xii) *APT Certification and Seminar Training* – Through the APT, tattoo artists have the opportunity to attend the "Prevention of Disease Transmission in Tattooing" (PDTT) seminar. This seminar allows tattoo artists to learn safe tattooing techniques, learn new techniques and safety measures, and refresh their existing knowledge. The seminars occur frequently and nationally in order for tattoo artists throughout the United States to attend. (For example, during 2002, training seminars are to take place in Orlando, FL; Philadelphia, PA; Minneapolis, MN; Detroit, MI; Atlanta, GA; Hollywood, CA; Pittsburgh, PA; Richmond, VA and numerous other locations). Certification is available to artists who attend these seminars and tattoo consumers are advised to look for this certification when visiting and choosing a tattoo parlor.

(xiii) *Increased Consumer Education / Screening* – While the majority of safety measures are employed by the tattoo artist, a marked increase in consumer education and consumer information has led to increased tattooing safety. Numerous information and "checklists" are available for tattoo consumers to inform them of what to look for in a professional and safe tattoo parlor. Numerous websites on the Internet supply information about what a tattoo-consumer should look for when "shopping" for a tattoo. The general / compiled checklist includes instructions to look for the following in a tattoo parlor before getting a tattoo there: (1) Autoclave; (2) Disposable gloves; (3) Vinyl or disposable apron; (4) Barrier on arm rest or customer chair, if necessary; (5) Barrier on work surface; (6) All items on the work station are readily accessible to avoid cross-contamination; (7) Ointments and petroleum jelly placed on surface before tattoo work is commenced; (8) Disposable razor; (9) Squeeze (not spray) bottle; (10) Barrier on squeeze bottle; (11) Disposable stencil; (12) No item re-used; (13) Only use of soap or water to apply stencil; (14) Disposable ink caps; (15) Ink must be poured out before the artist begins work; (16) Sterile packages with functioning steam-heat indicator for tubes and needles; (17) Barrier on machine head; (18) Barrier on power knob; (19) Barrier on clip cord; (20) Disposable wash cup; (21) Sharps container; (22) Needles disposed of in front of client; (23) Tattoo artist willing to answer any and all questions before beginning work; (24) A generally clean appearance to the shop that satisfies the client's "gut feeling."; and (25) Detailed instructions for client "aftercare."

AUG 19 2002

No. 01-1859

In the

Supreme Court of the United States

RONALD P. WHITE, *PETITIONER*,

v.

STATE OF SOUTH CAROLINA, *RESPONDENT*.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES M. CONDON
Attorney General for the State of South Carolina

JOHN W. McINTOSH
Chief Deputy Attorney General

ROBERT D. COOK
Assistant Deputy Attorney General

CHARLES H. RICHARDSON
Assistant Deputy Attorney General

DEBORAH R.J. SHUPE
Counsel of Record
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727
COUNSEL FOR RESPONDENT

QUESTION PRESENTED

Whether South Carolina's statute prohibiting lay people from injecting ink/dye under the skin of other people violates the First Amendment's free speech protection?

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STATEMENT OF THE CASE

In 1966, the South Carolina Legislature enacted S.C. Code §16-17-700 (Supp. 2001), making it unlawful for any person to "tattoo" the body of another person. The statute was amended in 1986 to allow a licensed physician or surgeon to tattoo part of a patient's body if in his medical opinion, it was necessary when performing cosmetic or reconstructive surgery. Violation of the statute is a misdemeanor, punishable by a discretionary fine and/or incarceration up to one year.

In 1999, the Petitioner Ronald P. White ("White") participated in a television news program on the subject of tattooing. He was shown in the broadcast applying a tattoo to the arm of another man, and was subsequently arrested for violating §16-17-700.[1]

At trial, White admitted knowingly violating the statute. He conceded there are public health and safety risks associated with tattooing, which constitutes a legitimate state interest. He further admitted he did not know anything about the risks associated with "nonprofessional" tattooists, but contended that he followed all "appropriate" safety precautions. (R., pp. 27-30).[2] In the face of his admission regarding the health risks associated with tattooing, White presented no evidence, other than his own self-serving testimony regarding his safety precautions, and that of another tattooist with no medical training, regarding the health

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[1]White contends that his arrest is the only arrest under the statute since it was enacted in 1966. (Petition, p. 6). The only cited support for that contention is a statement by counsel that he was personally unaware of any other arrests.

[2]Record cites are to the Record on Appeal filed with the South Carolina Supreme Court.

and safety issues, or the extent to which "appropriate" safety precautions abated those concerns.

White conceded that he could use other mediums, such as oil and acrylic paint on canvas, to create pictures, but stated that those mediums are "saturated, " and "commonplace," and he could not make any money doing them. He admitted that he could commute approximately an hour from his home to open his own tattoo shop in another state (North Carolina), but testified that he chose not to do so because he did not want to spend that time in an automobile. (R., pp. 34-37).

White argued that the statutory lay tattooing ban impermissibly restricted his free speech rights under the federal and state constitutions, restricted interstate commerce, and violated the Privileges and Immunities Clause of the federal constitution. The trial court found that the act of tattooing was not speech, and even if it was, the statutory ban was a valid exercise of South Carolina's police power in light of the impact on public health and safety.[3] As to White's other claims, the trial court held that the legislature can use appropriate means to regulate or prohibit any occupation to protect public health and safety, and that all contract and property rights are subject to the fair exercise of the state's police powers.

The trial court found White guilty as charged, and sentenced him to one year imprisonment and a $2,500 fine, suspended to five years probation and a $500 fine. White

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[3]White contends the trial court found that he "had engaged in a creative, artistic endeavor." (Petition, p. 6). The referenced transcript pages were not included in the record before the South Carolina Supreme Court, and therefore, are not appropriate for citation before this Court. Since those pages are not in the appellate court record, the Court cannot determine the text, or context, of the trial court's actual statements.

appealed, and the South Carolina Supreme Court heard oral argument on November 14, 2001.

On appeal, White abandoned his interstate commerce and privilege and immunities claims, and only contended that the statute impermissibly restricted his freedom of speech rights under the federal and state constitutions. The premise of his argument was that the "process" of applying a tattoo cannot be separated from the display of the tattoo, and therefore, both are protected as "art" under the First Amendment. (Pet. App., pp. 1a-3a).

By opinion filed March 4, 2002, the Supreme Court affirmed White's conviction, holding that the "process" of injecting dye to create a tattoo under another person's skin is not sufficiently communicative to warrant constitutional protection as "speech," symbolic or otherwise, and to outweigh the risks to public safety. In response to White's contention that "tattooing" is "art," which is entitled to the same protection as painting, writing or sculpting, the Court found that the activity of injecting dye under the skin is unique since it involves invasion of human tissue, and therefore, it may be subject to state regulation, including an outright ban, to which other "art" forms, on non-human mediums, may not be lawfully subjected. Noting that White bore the burden to establish by a clear showing that the statute violated some constitutional provision, the Court found that White had not shown why the process of injecting ink/dye under the skin to create a tattoo, with the inherent health risks, fell within the First Amendment.[4] (Pet. App., pp. 3a-7a)

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[4]In his dissent, Justice Waller concluded that by creating words, pictures, or images on the bodies of his customers, White intended to convey a message which was likely to be understood by viewers, and therefore, his conduct in creating the tattoos was entitled to the same constitutional protections as any other form of "art." Based on newspaper articles, Justice Waller concluded that the "more modern trend" indicates tattoos should be

The Court then examined whether the statute was arbitrary, with no reasonable relationship to the protection of health, welfare and safety of citizens, and found that White had virtually conceded there was a rational relationship between "tattooing" and public health. In light of that concession, and in the absence of any evidence to the contrary, the Court held that the statute was a reasonable exercise of the state's power to protect the health, welfare and safety of its citizens. (Pet. App., pp. 7a-9a).

White's request for rehearing was denied by unpublished order dated March 21, 2002. On June 19, 2002, White filed a Petition for Writ of Certiorari in this Court, which was docketed on June 21, 2002.

REASONS FOR DENYING THE PETITION

I. There is No Conflict Among Lower Courts Regarding the Question Presented in this Case.

White contends that since tattooing constitutes dissemination of the resulting art, the South Carolina Supreme Court's decision in this case conflicts with decisions from other courts holding that the dissemination of protected art is itself protected. White cites only three cases allegedly conflicting with the decision in this case, one of which is distinguishable, and the other two are not binding authority, even in the state in which they were issued.

In *Bery v. City of New York*, 97 F.3d 689 (2nd Cir. 1996), the Second Circuit determined that a city regulation prohibiting the plaintiffs from selling their artwork in public areas violated

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protected as "speech," and the state's efforts to restrict it should be subjected to a higher level of scrutiny. (Pet. App., pp. 9a-13a).

the First Amendment, holding that the sale of protected material was also protected. Significantly, the method used to produce the protected material was not at issue, and the court specifically found that "the street marketing is in fact a part of the message of appellants' art." *Id.* at 696. Thus, in accordance with *Spence v. Washington*, 418 U.S. 405 (1974), and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), the court looked for, and found, an intent to convey some message, even though not a "particularized" one.

In addition, the Second Circuit recognized that not all visual expression is protected under the First Amendment. Notably, the court cited *Yurkew v. Sinclair*, 495 F.Supp. 1248 (D.Minn. 1980), for the proposition that tattooing is conduct which falls outside of the First Amendment's protection. *Id.* In this case, the South Carolina Supreme Court also cited *Yurkew* as support for its conclusion that tattooing is unprotected conduct. (Petitioner's Appendix, pp. 3a-4a).

Comparison of the conduct in *Bery* and this case is truly an example of comparing apples to oranges. The conduct at issue in *Bery* (the public sale of artwork) is obviously different from the invasive procedure of injecting ink/dye under human skin to form a permanent image. There are no health concerns associated with the former, but White concedes there are inherent health risks associated with the latter. States have constitutionally viable authority to enact legislation protecting the health of their citizens. The New York regulations at issue in *Bery* were aimed at street congestion problems rather than health concerns, while South Carolina's tattoo statute is aimed directly at health and safety issues.

White also cites two Massachusetts lower court decisions declaring that Massachusetts' statutory lay tattooing ban was unconstitutional. *See Lanphear v. Massachusetts*, Case No. 99-

1896-B (Sup. Ct. Suffolk County 2000); *Massachusetts v. Meuse*, Case No. 9977-CR-2644 (Sup. Ct. Essex County 1999). Notably, neither of these decisions was reviewed by Massachusetts' appellate courts, and therefore, they do not constitute binding authority in that state, or present a conflict that requires this Court's intervention.[5]

Except for the two Massachusetts lower court decisions discussed above, every court that has examined the issue of whether the tattooing process is protected under the First Amendment, including the South Carolina Supreme Court in this case, has determined it is not, and accordingly, that states can validly ban the practice. *See Yurkew*, *supra* (practice of tattooing not entitled to First Amendment protection because it is not a "'significant medium for the communication of ideas,'" nor a medium that "'may affect public attitudes and behavior'") (quoting *Joseph Burstyn, Inc.*, 343 U.S. at 501); *State Medical Licensing Bd. of Indiana v. Brady*, 492 N.E.2d 34, 39 (Ct. App. 1986) (process of tattooing is neither speech, nor even symbolic speech, entitled to constitutional protection); *People v. O'Sullivan*, 96 Misc.2d 52, 409 N.Y.S.2d 332, 333 (N.Y. App. Div. 1978) (tattooing is not speech or symbolic speech, and defendant may not escape valid regulation by labeling his art form symbolic speech). Other courts have held that prohibitions of lay tattooing, such as that at issue in this case, are a legitimate exercise of the states' police power, and directly advance the states' interest in protecting the health, safety and welfare of their citizens. *See Kennedy v. Hughes*, 596 F.Supp. 1487, 1494-95 (D.C. Del. 1984) (ordinance prohibiting lay tattooing without licensed physician in attendance served a valid purpose in light of known health risks associated with the process, and was rationally related to the government's purpose of protecting public health);

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[5]Counsel has been unable to locate any appellate court decision holding that the act of tattooing is protected under the First Amendment.

Golden v. McCarty, 337 So.2d 388, 390 (1976) (due to the nature of tattooing, a restriction that tattooing be done by a person licensed to practice medicine or dentistry, or under his direction, bears a substantial relationship to public health, and is reasonable); *Grossman v. Baumgartner*, 17 N.Y.2d 345, 218 N.E.2d 259, 261-262 (1966) (in light of connection between tattooing and hepatitis, prohibition of lay tattooing was justified and reasonable).[6] Thus, there is no conflict among the lower courts regarding a state's authority to ban lay tattooing that warrants review by this Court, and the Petition should be denied.

II. The South Carolina Supreme Court Decision Does Not Conflict with this Court's First Amendment Decisions.

White argues the South Carolina Supreme Court's holding that "artistic expression" is protected only if sufficiently imbued with elements of communication to qualify as expressive conduct, conflicts with this Court's decisions holding that artistic expression is protected by the First Amendment. He asserts that this Court "has always protected art as art, without regard to whether it is also 'symbolic speech.'"

1. As the party raising a facial constitutional challenge to the statute at issue, White bears a "heavy burden." *National*

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[6]Even if, as White asserts, these states now allow lay people to engage in the occupation of tattooing, that does not equate with a recognition that the act of tattooing is protected speech. Rather, it merely reflects those states' decisions, for whatever reason, to allow the practice by lay people as well as licensed medical professionals. Those decisions do not mandate a similar decision by the State of South Carolina. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486 (1995) (one state's decision to permit brewers to disclose alcohol content on beer labels does not preclude neighboring states from effectively banning the disclosure of such information within their borders).

Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998). Facial invalidation is "strong medicine," which the Court has used "sparingly and only as a last resort," *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601 91973); *see also Clark v. Community for Non-Violence*, 468 U.S. 288, 293, n. 5 (1984) (the person seeking to engage in assertedly expressive conduct bears the obligation to demonstrate that the First Amendment even applies; otherwise, the rule would become that all conduct is presumptively expressive). White has failed to meet his burden in this case.

Initially, this Court has never held that merely labeling a particular mode of expression as "art" automatically entitles it to First Amendment protection. White cites *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), as support for such a holding. Examination of that case, and the cases cited therein, however, reveals that the Court was addressing the government's attempts to suppress "expression about philosophical, social, artistic, economic, literary, or ethical matters." *Id.* at 231 (emphasis added). In other words, the government sought to ban particular speech and/or conduct based on its content, not the medium used to express it. Even the obscenity jurisprudence White cites goes to "content" based infringements that are not at issue in this case.

It is undisputed that South Carolina's tattoo statute is not directed at the tattoo image, or any message the wearer seeks to convey by having it. Rather, it goes only to the act of injecting ink/dye under the skin to create that image, and imposes rational limitations regarding which people are allowed to do so.

White's argument essentially equates "artistic expression" with the method used to create an image. Accepting his argument would result in the protection of any process, or materials, someone chooses to use in the course of his "artistic expression," regardless of associated risks.

For instance, if a person decides that animal sacrifice is part of his "artistic expression," a state's animal cruelty laws would become subject to strict scrutiny as restrictions on free speech. This Court has never adopted such a wide ranging interpretation of the First Amendment's scope. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68, n. 15 (1973) (few could seriously claim that statutes outlawing bearbaiting, cockfighting, and other brutalizing animal sports, violate the First Amendment or any other constitutional provision). Rather, this Court has expressly acknowledged that while virtually every activity contains some expressive component, not all conduct can be labeled "speech" for First Amendment purposes. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 570 (1991) (citing *United States v. O'Brien*, 391 U.S. 367, 376 (1968)).

Assuming that the images created through the "tattooing" process are "art," White conceded at trial that he could create his "art" on canvas, rather than human tissue. (R. pp. 34-36). Further, body "art" can be created with body paint or henna, which are not prohibited in South Carolina. Even though such body images are not permanent, they are nonetheless ways that White could create his "art" without violating South Carolina law.

White points to the long history of tattooing, and its growing cultural acceptance, as grounds for affording the tattoo process itself constitutional protection. That history is irrelevant to the issue before the Court in this case. Obscenity has a long history as well, and it now seems to be more culturally accepted, but this Court has never hesitated to hold that obscenity, in <u>any</u> medium, is not entitled to First Amendment protection. *Kaplan v. California*, 413 U.S. 115, 119-20 (1973) ("As with pictures, films, paintings, drawings, and engravings, both oral utterance and the printed word have First Amendment protection until they collide with the long-settled position of this Court that obscenity is not protected by the Constitution.") (citations omitted).

2. White also argues that the South Carolina Supreme Court erred in applying the test established in *Spence v. Washington*, 418 U.S. 405 (1974), to determine if the process of applying a permanent tattoo by injecting ink/dye under human skin is entitled to First Amendment protection. He contends that in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), this Court held the *Spence* test does not apply to "artistic expression."

Contrary to White's contention, *Hurley* involved the clearly symbolic speech of participating in a parade, not 'artistic expression," and it did not declare the *Spence* test inapplicable. Rather, it merely clarified that a "narrow, succinctly articulable," or "particularized," message is not a condition of constitutional protection. 515 U.S. at 569.

The gist of the *Hurley* holding is that some intent to convey a message, even if not a narrow or particularized one, is required before First Amendment protection attaches. In holding that the First Amendment allowed organizers of the Boston St. Patrick's Day parade to ban participants based on their "message," the Court stated: "the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day." *Id.* at 574 (emphasis added). In short, some "message" was required before the First Amendment applied.

Similarly, White overstates the holdings of other cases he cites as support for his broad proposition. None of those cases involved the issue of whether in and of itself, the "act" of engaging in "artistic expression" is protected under the First Amendment. Rather, each case dealt with forms of human expression that are either readily apparent as means of

communication (music, dance, literature, theater, fine arts), or recognized as a "significant medium for the communication of ideas" (motion pictures). *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (constitutionality of restrictions on federal grants to state arts agencies, symphony orchestras, opera associations, dance theater foundations, and fine arts museums); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (music is one of oldest forms of human expression, which has the capacity to appeal to the intellect and emotions, and rulers have censored it to serve needs of the state); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (motion pictures are "a significant medium for the communication of ideas," and important as an "organ of public opinion"). Simply stated, the "act" of injecting ink/dye under another person's skin is neither 1) readily apparent as a means of communication, 2) a significant medium for communicating ideas, nor 3) a "uniquely valuable or important mode of communication." *See City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994) (residential signs are a "venerable means of communication that is both unique and important").[7]

Citing dicta from various decisions by this Court, White argues there is "lingering uncertainty" regarding the extent to which "art" is protected by the First Amendment. Rather than creating uncertainty, however, existing jurisprudence provides the fluid guidelines vital for application to a myriad of factual situations. White seeks a bright line rule to the effect that

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[7]Cases invalidating complete bans on certain methods of communication have focused on the significance of the particular method of communication at issue, and turned on whether the regulation at issue "eliminated a common means of speaking." *City of Ladue*, 512 U.S. at 55; *see also Schad v. Mount Ephraim*, 452 U.S. 61, 75-76 (1981) (live entertainment); *Martin v. City of Struthers*, 319 U.S. 141, 145-49 (1943) (door-to-door distribution of literature); *Jamison v. Texas*, 318 U.S. 413, 416 (1943) (handbills on public streets); *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938) (distribution of pamphlets).

anything labeled an "art form," or "artistic expression," is automatically entitled to First Amendment protection. Such a rule would fly in the face of well-established law requiring the person challenging a statute to present evidence that the expression at issue is protected, and create the exact presumption of constitutional protection this Court declined to create in *Clark*. 468 U.S. at 293, n.5.

As the Second Circuit noted in *Bery*, while courts may struggle with determining exactly what expression is encompassed within the First Amendment, such decisions are not impossible under existing law. 97 F.3d at 696. The fact that various courts have already addressing the exact issue presented in this case, and decided it adversely to White, reveals that the existing jurisprudence is sufficient to allow for reasoned analysis and decisions.

Merely labeling conduct as "artistic expression" does not entitle it to First Amendment protection. *See Barnes*, 501 U.S. at 578 (Scalia, J., concurring opinion) (unless the purpose of a law is to directly or indirectly impede speech, the First Amendment is not implicated simply because the law incidentally impacts expressive conduct); *People v. O'Sullivan*, 409 N.Y.S.2d at 333 (merely labeling tattooing as an "art form" does not entitle it to constitutional protection). Many would, and do, undoubtedly call obscenity "artistic expression," but it is well established that obscenity in any form is not constitutionally protected. The South Carolina Supreme Court properly applied the *Spence* test to determine whether White's "conduct" of injecting ink/dye under the skin of another person warranted constitutional protection, and correctly concluded that the "act" of tattooing another person was not sufficiently expressive conduct to fall within the First Amendment's protection.

White presented no evidence that the "act" of injecting ink/dye under the skin to form a permanent image is, or ever has been, an important or significant method of communicating ideas. On the contrary, as discussed above, virtually every court that has considered this issue has determined it is not. Therefore, White failed to meet his "heavy burden" to show that the statute is facially unconstitutional, there is in fact no basis for constitutional protection of this "act," and the Petition should be denied.

3. Even if this Court determines that the "act" of applying a permanent tattoo by injecting ink/dye under the skin is a form of "expression" entitled to some First Amendment protection, the statute at issue is still valid under existing First Amendment jurisprudence. "Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions." *Clark*, 468 U.S. at 293 (emphasis added). Such restrictions are valid if they are justified without reference to the content of the speech, they are narrowly tailored to serve a significant governmental interest, and they leave open alternative channels for communication of the information. *Id.*; *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 289-301 (2000) (prohibition of nude dancing was a valid, content neutral regulation, aimed at the secondary impact on the public health, safety and welfare, with incidental impact on any expressive element of the conduct); *Barnes* 501 U.S. at 565-572 (1991) (statute banning public nudity was valid, content neutral, exercise of state's authority to provide for public health and safety); *O'Brien*, 391 U.S. at 376-77 (when speech and non-speech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on free speech protection); *In Re Antonio O.*, 83 Cal.App.4th 1029, 100 Cal.Rptr.2d 218, 222-23 (Ct. App. 2000) (even if tattoos constitute speech under the First Amendment, prohibiting juvenile from getting additional tattoos as a condition of

probation, which focused on the manner in which a message is conveyed rather than the message, was a reasonable, content neutral, restriction on free speech rights).

It is undisputed in this case that South Carolina's tattooing statute is absolutely content neutral, and that the State has a significant interest in protecting the health and safety of its citizens, as well as the constitutional authority to enact legislation to further that interest. White concedes there are health risks directly related to tattooing, but contends those risks are vague and undefined. Contrary to White's contention, the health risks associated with tattooing are specific, and recognized by major health organizations, including the Food and Drug Administration ("FDA"), the Centers for Disease Control ("CDC"), and the American Red Cross.

As of November 29, 2000, the FDA lists the transmission of infectious diseases, such as hepatitis, removal problems,[8] allergic reactions, development of granulomas, and keloid scar formation, as primary complications associated with tattooing. FDA Fact Sheet, *Tattoos and Permanent Makeup* (Nov. 29, 2000).[9] Significantly, the FDA notes that "[e]ven if the needles are sterilized or never have been used, it is important to understand that in some cases the equipment that holds the needles cannot be sterilized reliably due to its design." *Id.*

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[8]Clearly, as the number of tattoos grows, the number of people seeking to have them removed, and the problems associated with removal, will grow as well.

[9]White asserts that the FDA does not regulate tattooing "in light of the success of [local] regulations. (Petition, p. 4). The FDA Fact Sheet does not address the purported "success" of local regulations, but merely acknowledges that local laws and regulations exist, and states that the FDA "has not attempted to regulate the use of tattoo inks and the pigments used in them and does not control the actual practice of tattooing."

(emphasis added). Thus, even with the most stringent sterilization requirements, there is still a significant risk of transmitting diseases through the process of tattooing.

The FDA also indicates that another health concern associated with tattooing is the variety of pigments and diluents used in the process, many of which are not even approved for skin contact, much less injection into the skin. The Fact Sheet further notes that some pigments are "industrial grade colors that are suitable for printers' ink or automobile paint." Id.; *see also* FDA - CDRH Device Advice, *Tattoo Equipment and Dyes* (August 17, 2001) (FDA's major concern is the safety of dyes and pigments used in tattooing).[10]

The health risks associated with injecting something akin to automobile paint under the skin are self evident, and cannot be eradicated with even the most stringent licensing and sterilization requirements. Clearly, a licensed physician, applying a tattoo he deems to be medically necessary, is better equipped to weigh the potential risks, and monitor potential complications from the procedure.

The CDC also acknowledges the potential risk of disease transmission through tattooing. CDC Fact Sheet, *HIV and Its Transmission*, (July 1999) (while there are no documented cases of HIV transmission through tattooing, the hepatitis B virus has

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[10]It does not appear that the long term effects of having these dyes and pigments injected under the skin has ever been studied or determined. In addition, modern removal techniques include laser treatments that essentially break the pigment down so that it can eventually be absorbed or removed through the body's immune system. *FDA Fact Sheet*; *see also Tattoo Removal FAQs* (available at tat2begone.com/htdocs/faqs.htm). There is no data regarding the health risks associated with having the equivalent of automobile paint floating around in the body, or even if it can be absorbed or removed by the immune system.

been transmitted through the process). The risk of potential disease transmission is so great that the American Red Cross prohibits blood donations for a full year after the donor receives a tattoo. American Red Cross, *Blood Donation Eligibility Guidelines* (Revised June 27, 2002) (available at www.redcross.org/services/biomed/blood/learn/eligibl.html). One health organization determined that "people who received tattoos from commercial tattoo parlors were nine times more likely to be infected with the hepatitis C virus than people who didn't have any tattoos." Southwestern Medical Center Health Watch, *Tattoo Dangers*, (May 14, 2001) (available at www3.utsouthwestern.edu/library/consumer/tattoodangr.htm) (emphasis added). *See also* Jennifer Morrison, *Tattoos Draw Health Alert*, Toronto Sun, July 19, 2001 (health officials worried about growing risk of being infected with hepatitis C while getting a tattoo) (available at www.canoe.ca/Health0107/19_tattoos-sun.html).

White himself admitted in an interview with Circle Magazine that several tattoo equipment companies increase the health risks associated with tattooing by selling equipment "to anyone, regardless of whether or not they have a license, or have presented evidence that they are otherwise qualified to apply a tattoo in any way." John Plummer, *Testing the First Amendment & Tattoo Law I*, Circle Magazine (available at www.circlemagazine.com/testingthefirst.html). Thus, according to White, even putting licensing requirements in place will not alleviate the health concerns associated with the process of tattooing.[11]

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[11]White disputes the level of health risks, and contends that the risks can be controlled through regulation, but presented no credible evidence on that issue at trial. Making such a determination is inherently within the province of the legislature, and to date, South Carolina's legislature, which reviewed the tattooing statute during the last four legislative sessions, has determined the health risks are still sufficiently great that the best way to

South Carolina's tattooing statute is narrowly tailored to serve the State's significant interest in protecting the health and safety of its citizens. It only prohibits lay people from engaging in one very specific method of applying body art - injection of ink/dye under the skin, which has proven health risks, while leaving available all other methods of creating body art. There are viable alternative channels for communicating any information and/or ideas White, and all others similarly situated, may wish to convey through body art. Thus, even if the Court determines that the tattooing "process" is entitled to some First Amendment protection, South Carolina's statute is constitutionally sound, and the Petition should be denied.

III. This Case Does Not Present Any Question of Exceptional Importance Warranting Review by the Court.

Granting review in this case will not serve to resolve any issue of "exceptional importance."[12] South Carolina has not banned an entire "art form." Assuming for purposes of argument that there is "art" at issue, it is "body art," which can be accomplished in mediums that do not involve significant health risks (body paint and henna), and are not banned by the statute. The only thing the statute prohibits is the act of injecting ink/dye under the skin by someone who is not a licensed physician.

None of the cases White cites as authority for granting certiorari on an issue of "exceptional importance" involve a process requiring the invasion of human tissue, with recognized

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control them is to continue banning lay tattoos. See Note 13, below.

[12]The small number of cases to date involving "tattooing," combined with White's assertion that forty-eight states now allow the practice, clearly indicate that the issue in this case is not "exceptional."

health risks, as a form of "expression." Contrary to White's assertions, South Carolina has not attempted to prohibit all expression through body art, and there is no ban on the wearing of body art, even permanent tattoos, in South Carolina. All the State has done is prohibit the injection of ink/dye under the skin by anyone other than a licensed physician doing it for medical reasons.

White, and any other lay person, is free to create "body art" in South Carolina using any medium other than the injection of ink/dye under the skin, and White is free to work as a tattooist in any of the forty-eight states that now apparently allow lay tattooing. Further, South Carolinians are free to wear, and display, even permanent tattoos that are applied outside of South Carolina. Therefore, the effect of a decision in this case would be minimal at best.

White has not even alleged that he was attempting to convey a message, particularized or general, through his tattoos. In fact, the testimony clearly revealed that his interest in tattooing is purely commercial. He admitted he is capable of painting in other mediums, he is licensed to give tattoos in North Carolina and various other states, and he has had the opportunity to work in "several very reputable tattoo shops." Even though White professed to have such a passion for tattooing, however, he admitted that he is unwilling, not unable, to travel in a car for the hour travel time required for him to work in North Carolina. (R., pp. 16-18, 34-37).

Finally, the record in this case is insufficient for any meaningful review of the merits. White devotes significant portions of his Petition to describing facts about tattooing – its history, popularity, demographics, and regulations. (Pet., pp. 3-5, 10-11, 17). Yet none of that discussion is based on evidence in the record. Indeed, other than his own self-serving testimony

regarding the statute's effect on his life, and the testimony of another tattooist who does not even live in South Carolina, White presented no evidence regarding the statute's impact on the "art" of tattooing. In particular, while admitting there are health risks associated with the practice of tattooing, White presented no credible evidence regarding how those risks can be alleviated, or indicating that South Carolina's statute is directed at anything other than those risks.

Any lay "tattooist" is free to create "body art" in South Carolina using any medium other than the injection of ink/dye under the skin, or to go to any of the forty-eight states that apparently have decided to allow non-medical people to do so. South Carolina's decision to prohibit lay tattooing directly involves an issue of public health and safety, which is clearly within the State's authority to regulate, even to the extent of banning it. Simply stated, there is no question of "exceptional importance" in this case that warrants review by this Court, and the Petition should be denied.[13]

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[13]Not only will the effect of review in this case be nominal nationally, it is possible that it would not have any lasting effect in South Carolina. The South Carolina legislature has considered revisions to the statute at issue in recent years, and a proposal to significantly revise it almost passed during the 2002 legislative session. *See* S.C. Senate Bill No. 0049 (2001-2002) (available at www.leginfo.state.sc.us). A similar proposal is anticipated during the 2003 legislative session.

CONCLUSION

Based on the foregoing, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

CHARLIE CONDON
Attorney General for the
State of South Carolina

JOHN W. McINTOSH
Chief Deputy Attorney General

ROBERT D. COOK
Assistant Deputy Attorney General

CHARLES H. RICHARDSON
Assistant Deputy Attorney General

DEBORAH R.J. SHUPE
Counsel of Record
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

COUNSEL FOR RESPONDENT

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No. 01-1859

IN THE
Supreme Court of the United States
OCTOBER TERM, 2002

RONALD P. WHITE,

Petitioner,

v.

SOUTH CAROLINA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of South Carolina

REPLY TO BRIEF IN OPPOSITION

JARED S. NEWMAN, P.A.
NEWMAN & MCDOUGALL
P.O. Box 1336
915 Port Republic Street
Beaufort, SC 29901-1336
(843) 379-7000

KENNETH W. STARR
Counsel of Record
DARYL JOSEFFER
RYAN P. PHAIR
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Counsel for Petitioner

August 30, 2002

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In an extraordinary submission, South Carolina unapologetically defends its assault on our system of free expression by pretending that the First Amendment problem can be defined away. All that is at stake, the Court is repeatedly told, is dye inserted under the skin. Under this deconstructionist exercise, South Carolina could likewise make sport of, say, Jackson Pollock's artistry. Perhaps Leo Frobenius's *The Children of Promise*,[1] with its displays of tattoo portraits, will be next on the censorship block.

Standing as a sharp rebuke to respondent's denial of historical and cultural reality, the ancient art of tattooing is on display in museums throughout the world. It continues, uninterrupted, across time and culture to capture the human imagination. Its popularity has been powerfully manifested of late in the actions of New York firefighters and others who have communicated, through tattoos, their solidarity and sorrow over the events of last September 11. Yet the South Carolina Supreme Court, over vigorous dissent, held that a complete ban on this established art form is entitled to *no* First Amendment protection. In a constitutional order that has long protected pornography, this decision is utterly at war with precedents of this and other courts.

As if more were needed, South Carolina takes aim at our system of federalism by now telling one of its citizens to leave hearth and home and journey across state lines in order to resume his artistry – artistry that is perfectly lawful and appropriately regulated for health reasons in forty-eight States. All petitioner needs to do, the Court is told, is to move to North Carolina. This novel approach to the right to

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[1] Leo Frobenius, *The Children of Promise* (New York: J.B. Lippincott, 1909). The book includes an 1826 self-portrait by a New Zealand chieftain, Te Pehi Kupe, featuring Kupe's lavish facial tattooing. A modern-day Kupe who found himself in Charleston or Greenville would be invited to leave the State if he wanted to enhance his display of New Zealand artistry.

travel, an invitation to depart enforced in dead earnest by the criminal law, is patently offensive to both First Amendment and federalism values. In a free society, this latter-day atavism should not stand. But it will unless this Court acts.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS.

Under the South Carolina Supreme Court's decision, *no* First Amendment scrutiny applies to the art of tattooing because (i) the "process" of tattooing is conduct rather than speech, and (ii) tattooing lacks a "particularized message" that would likely be understood by others. Pet. App. 3a, 5a-6a. Respondent mounts no credible argument that either holding is consistent with First Amendment principles.

a. As to the first of these holdings, respondent cannot refute the obvious point that its attempted distinction between "the process" of tattooing and the resulting tattoos is wholly illusory. If respondent's argument were accepted, a State could prohibit *the act of putting a pen to paper* or *the act of smearing paint around with horse hair* to justify a ban on books or paintings. A canyon-sized loophole would be opened. The book could be killed before it was written, the painting before it was painted. Thus, the Second Circuit has held, in conflict with the court below, that "conduct" that is part of the creation or dissemination of art falls within the ambit of the First Amendment. *See Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996).

Respondent attempts to distinguish the Second Circuit's decision in *Bery* by arguing that the "conduct" in *Bery* (the sale of artwork in public places) did not present "health concerns." Opp. 5. But the presence of health concerns hardly forestalls any and all First Amendment scrutiny. Instead, it is one of several factors to be considered *as part of* a court's First Amendment scrutiny. *See, e.g., Turner Broad. Sys., Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 662 (1994); *Hill v. Colorado*, 530 U.S. 703 (2000);

Amicus Curaie Br. of Center for Individual Freedom 5-6. If the presence of health concerns rendered the First Amendment wholly inapplicable to the "conduct" of creating speech, States could ban a wide range of activity – including typing (which can cause carpel tunnel syndrome) and sculpting (in which stone or metal might fall on an artist or observer) – *without regard* to its communicative or artistic content, or the availability of less drastic remedial measures.

b. While respondent at least struggles to defend the South Carolina Supreme Court's "conduct" analysis, it jettisons the court's other holding. Under that holding, artistic expression merits First Amendment protection only if it satisfies the *Spence* test, which asks "whether '[a]n intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood by those who viewed it.'" Pet. App. 5a (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (citing *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)). Application of this test in this case is directly contrary to *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), and *Bery*, both of which hold that artistic expression need not satisfy *Spence* to warrant protection. *See* Pet. 12-13.[2] Instead, this Court has repeatedly protected art as art. *See id.* at 8-10, 12 .

Significantly, respondent eschews any effort to defend the South Carolina Supreme Court's requirement of a "particularized" message that will likely be understood by others. *See, e.g.*, Opp. 10 (conceding that a "'particularized'

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[2] Respondent erroneously claims that *Bery* cited *Yurkew v. Sinclair*, 495 F. Supp. 1248 (D. Minn. 1980), "for the proposition that tattooing is conduct which falls outside of the First Amendment's protection." Opp. 5. In reality, *Bery* cited *Yurkew* for the proposition that "[c]ourts have struggled with such issues in the past," 97 F.3d at 696, an acknowledgement that serves only to underscore the need for clear guidance from this Court on these important issues. *See* Pet. 14-16.

message is not a condition of constitutional protection"). Instead, it advances a series of other arguments: that "[m]erely labeling conduct as 'artistic expression' does not entitle it to First Amendment protection," *id.* at 12; that an art form must be "an *important* or *significant* method of communicating ideas" to warrant protection, *id.* at 13 (emphasis in original); and that "*some* intent to convey a message, even if not a narrow or particularized one, is required before First Amendment protection attaches," *id.* at 10 (emphasis in original).

The first of these points is uncontroversial – "cockfighting" and "bearbaiting" (Opp. 9) are not art, regardless of whether one attempted to label them as such. But respondent's other attempts to limit the types of art entitled to First Amendment protection, and especially its focus on the supposed "importan[ce] or significan[ce]" of an art form, fly in the face of this Court's precedents protecting art as art. Pornography hardly has greater social importance than tattooing, but it has long been accorded at least some level of protection insofar as it is not obscene. *See, e.g., Miller v. California*, 413 U.S. 15 (1973). The obscenity inquiry, in turn, depends in part on whether pornography lacks "serious ... *artistic* ... value." *Id.* at 24 (emphasis added). Thus, the relevant question is whether tattooing is artistic expression, not whether it is deemed "important."

c. There can be no serious question that tattooing is an established form of artistic expression. Neither court below disagreed with that conclusion. As explained in the petition, and elaborated in detail by *amicus curiae* Dr. Enid Schildkrout, the chair and curator of the Division of Anthropology of the American Museum of Natural History, tattooing is an elaborate, 8,000 year old art form. *See* Pet. 3-4; Schildkrout Br. 4-5, 1a-3a. Tattoo art is on display in art and cultural museums around the world, and has been the subject of many scholarly symposia. *See* Schildkrout Br. 15-16, 10a-13a. Tattooing is done in numerous and ever-

evolving styles, designs, and colors. *See id.* at 5-14. It is, quite simply, art in the same sense that every other form of drawing or painting is art.

Moreover, tattoos are highly communicative. Crusaders who visited Jerusalem in the Middle Ages often received tattoos of religious emblems to communicate their accomplishments. *See id.* at 4. Before people had proper names in Europe, tattoos were an important way of identifying one another. *See id.* at 5. Most recently, there has been a tremendous surge in patriotic tattoos in the aftermath of last September 11. As the Washington Post recently reported, firefighters in particular have received tattoos to communicate solidarity with fallen firefighters and remember their losses. *See* Petula Dvorak, *Far More than Skin Deep: Firefighters Line Up for Tattoo Tributes to 9/11*, Washington Post, Aug. 24, 2002, at C1; Schildkrout Br. 14.

d. Respondent attempts to denigrade this 8,000-year-old artistic tradition by suggesting that tattoo artists could draw or paint on canvas instead, or could draw on bodies with paint or henna. *See* Opp. 9. Of course, this does nothing to support the South Carolina Supreme Court's contention that the First Amendment is *inapplicable*. The availability of alternatives is relevant to the application of First Amendment scrutiny, not to the determination whether any such scrutiny applies. *See, e.g., Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 122 S. Ct. 2080 (2002). Moreover, when governments attempt to impose complete bans on entire mediums of expression, this Court has vigilantly protected individual methods of expression, regardless of the availability of even close substitutes. *See, e.g., City of Ladue v. Gilleo*, 512 U.S. 43, 55-56 (1994) (residential sign ban); *Schad v. Mount Ephraim*, 452 U.S. 61, 75-76 (1981) (live entertainment); *Jamison v. Texas*, 318 U.S. 413, 416 (1943) (handbills); *Martin v. City of Struthers*, 319 U.S. 141, 145-49 (1943) (door-to-door distribution of

literature); *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938) (pamphlets).

Equally important, tattooing is inherently unique because it is a permanent symbol on a person's body. Other forms of body art, such as body painting, are not adequate substitutes because, as respondent recognizes, they are temporary. *See* Opp. 9. Just as drawing with chalk on a blackboard is no substitute for oil painting on canvas, so too painting on a body is no substitute for tattooing. Indeed, it is the very permanence of tattooing that renders it a unique form of art and a powerful form of communication. A permanent tattoo of a September 11 remembrance or the name of a loved one can be far more powerful than a drawing that soon washes off or fades away.[3]

Nonetheless, respondent repeatedly suggests that petitioner could exercise his First Amendment rights in neighboring States, such as North Carolina. *See, e.g.*, Opp. 18. That hardly matters. A ban on abortion would not be constitutional merely because abortions could be received in other States. First Amendment freedoms are no different. *See, e,g., Hill v. Colorado*, 530 U.S. 703, 781-82 (2000).

e. The bottom line is this: in a society that protects pornography, it should be self-evident that a ban on an entire art form cannot stand. That the South Carolina Supreme Court held the First Amendment wholly inapplicable to such a ban reflects, in part, uncertainties in this Court's artistic expression jurisprudence. This Court has held that the *Spence* test does not apply to artistic expression, but it has never identified the test that does apply. *See* Pet. 15. This

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[3] Respondent is wrong to claim that petitioner "conceded that he could use other mediums, such as oil and acrylic paint on canvas, to create pictures." Opp. 2. Petitioner testified that although his parents encouraged him to be a painter, painting never made him "feel like [he] was an artist." Record Tr. at 35. Petitioner never conceded that painting on canvas and tattooing are interchangeable, as respondent implies.

lacuna in the Court's jurisprudence contributed to the South Carolina Supreme Court's reliance on its untenable distinction between the process of creating art and art itself. It has also led respondent to borrow a series of unhelpful tests from other aspects of this Court's jurisprudence, such as expressive conduct cases that address indirect and incidental burdens on expression (but not direct bans on an entire form of artistic expression). *See, e.g.*, Opp. 9. This Court could usefully clarify this important area of law.

II. THE STATUTE CANNOT SURVIVE ANY LEVEL OF FIRST AMENDMENT SCRUTINY

In addition to abandoning the South Carolina Supreme Court's reliance on the *Spence* test, respondent relies on another rationale the court below eschewed: that the statute could survive intermediate First Amendment scrutiny because it is "narrowly tailored to serve the State's significant interest in protecting the health and safety of its citizens." Opp. 17. Respondent has not even begun to show that its complete ban is "narrowly tailored." In the state courts, respondent introduced *no* evidence on the health effects of tattooing. In contrast, petitioner testified that tattooing can be performed safely. *See* Record Tr. at 18-19. He also called John Black, a former director of the board of the Alliance of Professional Tattooists, who offered testimony on the effectiveness of federal regulations in furthering the States' interest in safety while affording proper respect for First Amendment rights. *See id.* at 50-60.

Instead of attempting to carry its evidentiary burden on this point, respondent attempts to shift the burden to petitioner. *See, e.g.*, Opp. 1, 16 n.11, 18-19. This turns the First Amendment inquiry upside down. It is well settled that "[w]hen the government restricts speech, *the government* bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000) (collecting cases) (emphasis added).

The absence of record evidence supporting the ban is fatal to *respondent's* case, not petitioner's.[4]

The want of narrow tailoring is underscored by the impressive body of experience from other States. Marching down memory lane, respondent trumpets a series of old cases holding that various tattoo bans were constitutional. *See* Opp. 6-7. There is, however, a fundamental flaw in this litany of cases – every one of those bans was enacted at a time when health risks associated with tattooing were poorly understood and there was reason to believe the risks were substantial. *See* Pet. 4. Since then, the medical profession, tattoo artists, and federal and state regulators have developed precautions that are so effective that *all* of the bans at issue in those cases have been repealed. *See id.* at 4-5. Since then, there has been no health epidemic from tattooing in any of the 48 States that regulate but do not ban tattooing. Thus, the courts that have considered tattoo bans in recent years have invalidated them. *See id.* at 14. There is no basis in the record or real-world experience for respondent's assertion that its complete ban on tattooing is "narrowly tailored" to meet or respond to health concerns.[5]

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[4] Respondent attempts to make up for this deficiency by citing a selection of random statements from various Food and Drug Administration ("FDA") pamphlets for the proposition that there is some risk associated with tattooing. *See* Opp. 14-15. But respondent neglects to mention that the FDA has expressly declined to regulate that risk precisely because existing regulations are sufficient to protect the public health. *See FDA Advisory Opinion*, Docket No. 81A-0315/AP (July 21, 1986); *see also* Pet. 4-5; Br. of *Amici Curiae* Alliance of Professional Tattooists, Inc. & National Tattoo Ass'n, Inc. ("Tattooists' Br."), App. A.

[5] Even if First Amendment freedoms were not at stake, South Carolina's insistence on completely banning a practice merely because there are some risks associated with it would be untenable. *See* Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 11-20 (Harvard 1999) (cautioning against overzealous regulatory efforts to reduce risk to zero).

Finally, it should not pass unnoticed that respondent's vaunted concern with the health effects of tattooing does not appear to be the actual reason South Carolina continues to ban the art form. As the Wall Street Journal recently reported, the main legislative proponent of South Carolina's tattoo ban, Senator Jake Knotts, has always justified the ban on religious, not health, grounds. *See* Robert S. Greenberger, *Tattoo Taboo: In South Carolina, You Can't Get One,* Wall St. J., July 22, 2002, at A1 (quoting Sen. Knotts as stating that "[i]f God wanted you to have a tattoo, he'd have put your name on you"); Tattoists' Br. 5-6 n.3 (providing additional citations). That will not do in a free society.

III. THIS CASE IS MANIFESTLY APPROPRIATE FOR CERTIORARI.

The much-discussed decision below is too profoundly anti-liberty to stand uncorrected. An entire art form has been banned throughout an entire State on the ground that the First Amendment is wholly inapplicable to the "conduct" of creating art. In its assiduous attention to protecting the foundational principles of free expression, this Court has frequently granted *certiorari* in First Amendment cases in the absence of a circuit split. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 784 (1989). Just last Term, this Court granted *certiorari* in two First Amendment cases in such circumstances. *See Republican Party of Minnesota v. White*, 122 S. Ct. 2528 (2002); *Watchtower*, 122 S. Ct. 2080. More specifically, this Court has exhibited a special willingness to review *complete bans* on entire mediums of expression, regardless of the absence of a circuit split. *See, e.g., Watchtower,* 122 S. Ct. at 2086.

The need for review is especially keen inasmuch as petitioner has been *criminally convicted* for performing his artistry. South Carolina sentenced petitioner to a year in prison (suspended to five years of probation) and a $2,500

fine (suspended to $500). In allocating limited judicial resources, this Court has evinced a special concern with protecting the rights of criminal defendants. *See, e.g., Stutson v. United States*, 516 U.S. 193, 196 (1996) (per curiam). This is not the time to stop.

* * * *

Before closing, we are constrained to point to a troubling structural anomaly that renders review by this Court even more urgent. The court below required petitioner to make a "clear showing" that "the act is invalid, leaving no room for reasonable doubt that it violates some provision of the Constitution." Pet. App. 4a (internal quotation omitted). That requirement finds no support in this Court's precedents. Constitutional rights should be *protected*, not subjected to *heightened* burdens not imposed on more routine defenses.

This unfairness is magnified by the fact that the justices of the South Carolina Supreme Court are appointed to *limited terms* by the legislature. As Alexander Hamilton explained, this system of selecting justices is "fatal" to judicial independence. *The Federalist No. 78,* at 398 (Alexander Hamilton) (Bantam 1982). That justices appointed in this manner have erected a strong presumption in favor of the constitutionality of state statutes leads inexorably to an appearance of partiality. When judges appointed in this manner uphold a criminal conviction on the ground that an entire art form falls wholly outside the First Amendment, this Court's intervention is all the more needed.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

JARED S. NEWMAN, *P.A.*
NEWMAN & MCDOUGALL
P.O. Box 1336
915 Port Republic Street
Beaufort, SC 29901-1336
(843) 379-7000

KENNETH W. STARR
Counsel of Record
DARYL JOSEFFER
RYAN P. PHAIR
KIRKLAND & ELLIS
655 FIFTEENTH STREET, N.W.
WASHINGTON, D.C. 20005
(202) 879-5000

Counsel for Petitioner